No. 24-351

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, ET AL., PETITIONERS

v.

LEBENE KONAN

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

REPLY BRIEF FOR THE PETITIONERS

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Respondent cannot escape the conclusion that her claims arise out of the "loss" or "miscarriage" of mail under the postal exception to the Federal Tort Claims Act (FTCA). 28 U.S.C. 2680(b). With respect to "miscarriage," respondent does not meaningfully dispute that her claims fall within contemporaneous dictionary definitions of the term, and she provides no valid basis for disregarding those definitions. With respect to "loss," respondent does not dispute that her complaint alleges a "loss" of mail under the FTCA's sovereign-immunity waiver, 28 U.S.C. 1346(b)(1), and she offers no sound reason to give the word a different meaning in the postal exception. Indeed, pre-FTCA cases used the terms "miscarriage" and "loss" to describe the precise conduct alleged here.

The upshot is that, under the government's interpretation, respondent's claims satisfy two of the postal exception's three prongs. Respondent regards (Br. 9) that overlap as a sign that the government's interpretation is wrong because, in her view, each prong should be given a "separate ambit." But when Congress enacted the FTCA, "loss" and "miscarriage" were understood to be overlapping terms. Congress included both terms in the postal exception anyway, embracing the same belt-and-suspenders approach that it adopted in the FTCA's intentional-tort exception.

Conversely, respondent's position that her claims fall within *none* of the postal exception's prongs is untenable. That position rests on a strained interpretation of each prong that gerrymanders around her claims. Even under a "separate ambit" approach, wrongfully detaining mail and returning it to sender, rather than delivering it to its proper destination, is, at minimum, a "miscarriage" of mail.

I. RESPONDENT'S CLAIMS ARISE OUT OF THE "MISCARRIAGE" OF MAIL

As our opening brief explains (at 13-15), the ordinary meaning of "miscarriage" is the "[f]ailure (of something sent) to arrive" or "[f]ailure to carry properly." *Webster's New International Dictionary of the English Language* 1568 (2d ed. 1942) (*Webster's Second*). Here, respondent alleges that the mail failed to arrive because postal employees improperly returned the mail to the local post office and then to sender. Gov't Br. 22. Respondent thus alleges a "miscarriage" of mail. Against that straightforward analysis, respondent makes two arguments, neither of which has merit.

A. A "Miscarriage" Does Not Require That The Mail Go To The Wrong Address, But Even If It Did, That Is What Respondent Alleges

Respondent first argues (Br. 15) that her allegations do not describe a "miscarriage" because "her mail did not go to the wrong address." But that is not the only form of "miscarriage," and even if it were, she alleges that her mail went to the wrong address.

1. A "miscarriage" does not require that the mail go to the wrong address

a. As our opening brief explains (at 13-14), contemporaneous dictionaries uniformly define "miscarriage" as any failure of the mail to arrive or to be carried properly. So while carrying the mail to the wrong address certainly counts as a "miscarriage," it is not the only thing that counts. As dictionaries show, the ordinary meaning of "miscarriage" also encompasses failing to carry the mail at all, as well as failing to deliver the mail on time or in proper condition. Gov't Br. 22.

Respondent does not cite any dictionary to the contrary. Instead, she contends (Br. 2) that dictionary definitions of "miscarriage" are inapposite because they do not apply "in the specific context of *mail*." But the definitions themselves refute that contention. *Webster's Second*, for example, refers to the "[f]ailure (*of something sent*) to arrive" and the "[f]ailure to carry properly; as, *miscarriage of goods*." *Webster's Second* 1568 (emphases added). Similarly, the *Oxford English Dictionary* refers to the "failure (*of a letter*, etc.) to reach its destination." 6 *Oxford English Dictionary* 497 (1933) (*Oxford English Dictionary*) (emphasis added).

Finding no support in definitions of "miscarriage," respondent relies on definitions of "miscarry" instead. See Br. 15-16. But the word Congress chose was "mis-

carriage," not "miscarry." And "a noun and its adjective form may have meanings as disparate as any two unrelated words." *FCC* v. *AT&T Inc.*, 562 U.S. 397, 403 (2011); see *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 301 (1989) ("request" may have a different meaning when "used as a noun" than when "used as a verb"). The Court should therefore honor the definition of the word Congress chose.

In any event, no definition of "miscarry" supports respondent's interpretation. Respondent quotes *Funk & Wagnalls* as defining "miscarry" to mean "[t]o be carried to a wrong place." Br. 15 (brackets in original; citation omitted). But that is only part of the definition. The definition states in full: "[t]o be carried to a wrong place *or by a wrong route, go wrong or be lost in transit*." 3 *Funk & Wagnalls New Standard Dictionary of the English Language* 1585 (1927) (*Funk & Wagnalls*) (emphasis added). As that definition shows, carrying the mail to the "wrong place" is just one form of miscarrying it. *Ibid.* The mail could also be carried to the right place, but by "a wrong route"—causing the mail to arrive late. *Ibid.* Or something else could "go wrong"—causing the mail to arrive damaged or not at all. *Ibid.*

Respondent quotes selectively (Br. 15-16) from other dictionaries' definitions, suggesting that they define "miscarry" as only the mail going to the wrong place. But the definitions she cites define "miscarry" more broadly, and the parts she leaves out squarely encompass her allegations here. Compare Resp. Br. 15-16, with, *e.g.*, 6 *Oxford English Dictionary* 498 ("[*t*]*o fail to reach its proper destination*; to get into wrong hands") (emphasis added); *Webster's New International Dictionary of the English Language* 1379 (1930) (*Webster's First*) ("[*t*]*o fail of reaching the destination*, *or* to go to

the wrong destination; to go astray") (emphasis added); *Webster's Second* 1568 ("[*t*]*o fail of reaching the destination*, *or* to go to the wrong destination) (emphasis added); *Webster's Third New International Dictionary of the English Language* 1442 (1966) ("*to fail to reach the intended destination*" or "go to the wrong destination") (emphasis added).

b. Respondent further contends (Br. 22) that dictionary definitions of "miscarriage" do not reflect the term's "common usage." But "[a] dictionary definition states the core meanings of a term." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 418 (2012) (*Reading Law*). And unlike in *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566-569 (2012), all the dictionaries here define "miscarriage" in fundamentally the same way. There is thus no reason to doubt their reliability.

In fact, other evidence of common usage confirms what the dictionaries say. Pre-FTCA judicial decisions used "miscarriage" (or its cognates) to describe any failure of the mail to arrive or to be carried properly, including:

- The failure of the mail to reach its proper destination, for whatever reason. See, *e.g.*, *Hogan* v. *Bailey*, 110 P. 890, 890 (Okla. 1910) ("miscarri[age]" of mail "returned to the writer"); *Southern Express Co.* v. *Hill*, 98 S.W. 371, 372 (Ark. 1906) (statement of facts) ("miscarriage" of package "sold" instead of delivered); *Fosters* v. *McKibben*, 14 Pa. 168, 170 (1850) ("miscarri[age]" of letter left unclaimed at the post office because of postmaster's failure to publish notice of the letter in the newspaper).
- The failure of the mail to arrive on time, even though it arrived at its proper destination. See,

e.g., *Missouri, K. & T. Ry.* v. *Ellis*, 156 P. 226, 228 (Okla. 1916); *Western Home Ins. Co.* v. *Richardson*, 58 N.W. 597, 598 (Neb. 1894).

- The failure of the mail to arrive in proper condition, even though it arrived at its proper destination. See, *e.g.*, *Elam* v. *St. Louis & S.F. R.R.*, 93 S.W. 851, 851 (Mo. Ct. App. 1906).

Respondent identifies no contrary evidence of common usage. She cites (Br. 16-17) pre-FTCA decisions and other sources using "miscarriage" to describe cases in which the mail failed to arrive because it went to the wrong place. But none of those sources suggests that "miscarriage" refers *only* to such cases, and the authorities above prove the opposite.

c. Respondent's reliance (Br. 20) on *Dolan* v. *United States Postal Service*, 546 U.S. 481 (2006), is likewise misplaced. *Dolan* stated that mail is "'miscarried' if it goes to the wrong address." *Id.* at 487. But again, it did not suggest that "miscarriage" refers only to that situation. In fact, *Dolan* went on to describe the term more broadly, as "refer[ring] to failings in the postal obligation to deliver mail in a timely manner to the right address." *Ibid.* Such failings include the mail "fail[ing] to arrive at all or arriv[ing] late, in damaged condition, or at the wrong address." *Id.* at 489.

2. Regardless, respondent alleges that the mail went to the wrong address

Even if "miscarriage" referred only to the mail going to the wrong address, respondent alleges that the mail went to the wrong address in this case. Specifically, she alleges that, instead of putting the mail in her residences' mailboxes, postal employees carried the mail

back to the local post office and then returned it to sender. Gov't Br. 22.

a. Respondent contends (Br. 24) that improperly carrying the mail back to the post office does not count as carrying the mail to the wrong place. But contrary to respondent's contention (*ibid.*), pre-FTCA decisions used "miscarriage" (or its cognates) to describe "mail that [wa]s halted on its journey." For example, in an opinion by then-Judge Cardozo, the New York Court of Appeals described as "miscarried" mail that had been left "behind a radiator in the post office." *Heinrich* v. *First Nat'l Bank*, 113 N.E. 531, 531-532 (1916); see, *e.g.*, *Kellogg* v. *Smith*, 42 P.2d 493, 493-495 (Okla. 1935) (per curiam) ("miscarriage" of mail "deposited in the United States post office" because of "failure of the postal authorities to deliver" it); *Fosters*, 14 Pa. at 170 ("miscarri[age]" of letter left unclaimed at the post office).

Those decisions refute respondent's contention (Br. 18) that "[m]iscarriage" does not encompass mail that the Postal Service "withholds or detains." They also undermine her reliance (*ibid.*) on a provision of the 1940 edition of the *Postal Laws and Regulations*, which charged the Division of Stamps with "the adjustment of cases of loss, miscarriage, or detention of stamped supplies in transit." U.S. Post Office Dep't, *Postal Laws and Regulations of 1940* § 12(6) (1941). While supplies detained *improperly* would count as a "miscarriage," supplies detained *properly* would not. Reference to "detention" merely ensured that the Division could adjust supplies in the latter situation, without implying that "miscarriage" did not cover the former situation.

Respondent contends (Br. 18) that the "prefix 'mis-,' as opposed to 'non-[,]' confirms that a refusal to deliver is different from a miscarriage." But as our opening

brief explains (at 16), "mis-" is a "prefix meaning amiss, wrong, ill, wrongly." *Webster's Second* 1567 (emphasis omitted). Combining "mis-" with "carriage" thus yields a word broad enough to cover any failure to carry the mail properly, including by not delivering it. Contrary to respondent's suggestion (Br. 18), "misdelivery" is similar: It describes not just "delivery to the wrong party," but also "delivery of goods damaged by the carrier" and "a total failure to deliver the goods." Steven H. Gifis, *Barron's Law Dictionary* 319 (1996) (emphases omitted).

b. Respondent also contends (Br. 25) that improperly returning the mail to sender does not count as carrying the mail to the wrong place. But contrary to respondent's contention (*ibid.*), pre-FTCA decisions used "miscarriage" (or its cognates) to describe mail that had been returned to sender. See, *e.g.*, *Bowen* v. *Wilson*, 15 F.2d 733, 734 (D.C. 1926) ("miscarriage" of summonses that "were returned not served"); *Hogan*, 110 P. at 890 ("miscarri[age]" of mail "returned to the writer"); *People ex rel. Holdsworth* v. *Superior Court*, 18 Wend. 675, 677-678 (N.Y. Sup. Ct. 1837) ("miscarri[age]" of mail in *Chichester* v. *Cande*, 3 Cow. 39, 41 (N.Y. Sup. Ct. 1824), which had been returned to sender). Those decisions reflect the ordinary meaning of "miscarriage." Anyone who entrusted a carrier "to deliver the mail to a designated recipient" (Resp. Br. 25) would think that the carrier had failed to carry the mail properly if the carrier simply returned the mail.

c. This case thus presents no need to explore the outer limits of "miscarriage." It is undisputed that carrying the mail to the wrong address counts as a "miscarriage," and because that is what respondent alleges, the Court need not address what else the term might cover.

B. A "Miscarriage" Of Mail Can Be Caused Intentionally

Respondent separately contends (Br. 15) that a "miscarriage" of mail may occur only "*mistakenly*." But as our opening brief explains (at 15-16), dictionary definitions of the term broadly cover any "failure" of the mail to arrive or to be carried properly, whether intentional or unintentional. Respondent replies (Br. 23) that the word "failure" does not "usually cover deliberately wrongful conduct." But her own example disproves her point: Someone who "deliberately skipped" an appointment would naturally be described as having "fail[ed] to arrive" at the appointment. *Ibid.* Indeed, this Court's decisions routinely describe "failures" that were intentional rather than unintentional. See, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 415 (1988) (discussing sanction for "willful" "failure to comply" with a court order); *United States* v. *Illinois Cent. R.R.*, 303 U.S. 239, 244 (1938) ("failure had been intentional instead of merely negligent").

Respondent cites (Br. 19) various pre-FTCA decisions involving unintentional miscarriages of mail. But once more, none of those decisions suggests that such miscarriages can *only* be unintentional. To the contrary, pre-FTCA decisions used the word "miscarriage" (or its cognates) to describe mail that was intentionally not delivered. See, *e.g.*, *Southern Express Co.*, 98 S.W. at 372 (statement of facts) (package intentionally "sold" instead of delivered); p. 8, *supra* (cases involving mail intentionally returned to sender).

Respondent also contends (Br. 23-24) that many words that begin with "mis-" "connote inadvertence." But "miscarriage" has a particular history: It originated as a word that described "[i]ll conduct; evil or improper behavior." *Webster's Second* 1568; see 6 *Oxford English Dictionary* 497 (defining "[m]iscarriage" to include "[m]isconduct;

misbehaviour"); *Funk & Wagnalls* 1585 (defining "miscarriage" to include "[w]rong or improper bearing or behavior, misconduct"). To be sure, "miscarriage" has a different and broader meaning today. But its origins as a word that described "ill" or "evil" behavior makes it particularly implausible that Congress used the term to exclude such misconduct.

II. RESPONDENT'S CLAIMS ARISE OUT OF THE "LOSS" OF MAIL

Respondent's own complaint alleges that she suffered "loss of access to time-sensitive mail." Pet. App. 53a. Respondent nevertheless contends that her claims do not arise out of a "loss" of mail under the postal exception. The Court should reject that contention.

A. "Loss" Means Deprivation, Not Just Destruction

Respondent first argues that "loss" in the postal exception means "destruction" (Br. 25) or "damage" (Br. 9, 36). But while "destruction" is one form of "loss," it is not the only form. Rather, "loss" refers to deprivations generally, not just destruction.

1. As our opening brief explains (at 33), the word "loss" appears in the FTCA's sovereign-immunity waiver, which waives the United States' sovereign immunity for claims for "injury or loss of property, * * * caused by the negligent or wrongful act or omission" of a federal employee. 28 U.S.C. 1346(b)(1). "Loss" in the sovereign-immunity waiver means "deprivation"—*i.e.*, the failure to keep, have, or get something. *Webster's Second* 1460; see Gov't Br. 30. And this Court generally presumes that the same term within a single statute bears a consistent meaning. Gov't Br. 33-34. Thus, "loss" in the postal exception means the same thing: "deprivation."

Noting that "loss" has many possible meanings, respondent asks (Br. 31-32) why "deprivation" is the relevant one. The reason is that "loss" is being used here in the context of "loss *of property*." 28 U.S.C. 1346(b)(1) (emphasis added); see 28 U.S.C. 2680(b) ("loss" of "letters or postal matter"). One of the entries for "loss" in *Webster's Second* expressly refers to "*loss* of property," and it defines "loss" in that context as "deprivation." *Webster's Second* 1460. "Deprivation" is thus the relevant meaning of "loss" here.

Respondent contends (Br. 33) that defining "loss" as deprivation—*i.e.*, the failure to keep, have, or get something—is inconsistent with how an "ordinary English speaker" would use the term "loss." But respondent herself used the term in that way when she stated that she "lost * * * important mail addressed to her." Resp. C.A. Br. 10. Indeed, her complaint alleges that because she was denied access to her mail, she suffered "loss of medical records, and loss of access to time-sensitive mail." Pet. App. 53a; see Gov't Br. 43 (providing other examples of respondent using "loss"). Respondent's own words show that an ordinary English speaker would use "loss" to mean "failure to have or get."

Respondent's examples (Br. 33) do not prove otherwise. Each involves a self-inflicted deprivation—a deprivation that a person *caused herself* to suffer. That is not the context in which "loss" appears here. As our opening brief explains (at 42), the FTCA uses "loss" to refer to a deprivation that *someone else* caused the person to suffer. And in that context, it is natural to say that the victim "lost" the thing that the other person deprived her of getting.

Respondent also asserts (Br. 31) that "[w]hatever 'loss' means, it does not include mail detained or with-

held." But respondent does not tie that assertion to the ordinary meaning of the word or to any dictionary definition. Nor could she. A person whose mail has been detained or withheld has been deprived of it. Consistent with that ordinary meaning, pre-FTCA decisions used "loss" to describe withheld mail. See, *e.g.*, *Dunlop* v. *Monroe*, 11 U.S. 242, 244, 269 (1812); *Wilson* v. *Pearson*, 13 F. 386, 388 (S.D.N.Y. 1882).

2. Respondent offers no plausible alternative definition of "loss." She contends (Br. 9, 25) that "loss" means "destruction" (or "damage"), rather than deprivation. But while destruction is one way to cause a deprivation, it is not the only way. Gov't Br. 32. Indeed, no one thinks "loss" means only "destruction" in the FTCA's sovereign-immunity waiver. If it did, respondent's own conversion claim—which alleges a loss of property when postal employees converted her mail—would not even be covered by the waiver in the first place. Pet. App. 58a-59a. "Loss" also cannot plausibly mean only "destruction" or "damage" in other FTCA provisions in which "loss" appears, see 28 U.S.C. 2672, 2675(a), 2679(b)(1), including the detention-of-property exception, see 28 U.S.C. 2680(c). Respondent's contention that "loss" means "destruction" or "damage" therefore cannot be squared with the overall statutory scheme.

Moreover, respondent's reasons for thinking "loss" means "destruction" or "damage" do not hold up. Respondent contends (Br. 26) that the "first entry" for "loss" in the *Oxford English Dictionary* and *Webster's First* is "destruction." She then equates (Br. 25-26) that "first entry" with the term's "primary definition." But those dictionaries "list senses from oldest in the language (putting obsolete or archaic senses first) to newest." *Reading Law* 418; see 1 *Oxford English Diction-*

ary xxxi ("[T]hat sense is placed first which was actually the earliest in the language."); *Webster's Second* xv (explaining that Noah Webster was "the precursor, if not the actual originator[,] of the 'historical' method of arranging definitions"). It is therefore wrong to equate "the first sense listed" with "the 'main' sense." *Reading Law* 418. Instead, one "must use the context in which a given word appears to determine its aptest, most likely sense." *Ibid.* And given the context here, the aptest, most likely sense of "loss" is "deprivation." See pp. 10-12, *supra*.

Respondent further contends (Br. 26) that "[d]estruction" was "the sense of 'loss' most closely associated with the mail at the time of the FTCA's passage." But the pre-FTCA decisions and other sources that she cites (Br. 26-27) do not support that contention. At most, they show that "destruction" was understood to be one way to cause a "loss" of mail, but they do not suggest that it was the exclusive way. To the contrary, pre-FTCA decisions associated the "loss" of mail with many other causes besides its "destruction." Those causes include the detention or withholding of mail, see p. 12, *supra*; the theft of mail, see, *e.g.*, *Deal* v. *United States*, 274 U.S. 277, 282-283 (1927); *Boerner* v. *United States*, 117 F.2d 387, 388 (2d Cir. 1941); and the misplacement of mail, see, *e.g.*, *Heinrich*, 113 N.E. at 531. Those decisions show that "loss" was understood to mean deprivation—and thus used to describe any failure of the mail to "arrive[] at the place of destination." *Shaw* v. *Pershing*, 57 Mo. 416, 421 (1874).

3. Respondent's fallback argument (Br. 29)—that "'loss' meant 'misplacement' instead of 'destruction'"—fails for the same reasons. No one disputes that misplacement can be a "loss." But "loss" cannot plausibly refer only to misplacement. Respondent cites no diction-

ary or case that limits "loss" in that way. And no one reads "loss" elsewhere in the FTCA—including in the sovereign-immunity waiver—as so limited. Respondent's fallback argument thus cannot be squared with ordinary meaning or the overall statutory scheme.

B. A "Loss" Of Mail Can Be Caused Intentionally

Respondent also contends (Br. 27, 29) that any "loss" must be inadvertent. But as our opening brief explains (at 32-33), the ordinary meaning of "loss" encompasses deprivations caused intentionally; contemporaneous dictionaries treated such deprivations as representative uses of the word. And Congress embraced that ordinary meaning of "loss" in the sovereign-immunity waiver, which encompasses "loss[es]" caused "negligent[ly] *or wrongful*[*ly*]"—*i.e.*, intentionally. 28 U.S.C. 1346(b)(1) (emphasis added). Respondent's view that a "loss" can only be inadvertent thus contradicts both ordinary meaning and the presumption of consistent usage. Indeed, it even contradicts her preferred meaning of the term. "Destruction" often refers to intentional, rather than inadvertent, conduct, such as "the 'destruction' of a draft card," *Free Speech Coal., Inc.* v. *Paxton*, 145 S. Ct. 2291, 2309 (2025) (citation omitted); the "destruction of paper and electronic documents," *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 701 (2005); or the destruction of undeliverable mail, pursuant to postal regulations, see Gov't Br. 32.

Respondent asserts that a "loss" is "*usually* unintentional." Br. 34 (quoting Pet. 14) (brackets omitted). But respondent conflates that purported fact about the world with the ordinary meaning of "loss." Limousines may usually be black, but the ordinary meaning of "limousine" still encompasses ones that are white. Likewise here, even assuming losses are usually caused "negligent[ly],"

the ordinary meaning of "loss" still encompasses losses caused "wrongful[ly]," as the FTCA expressly contemplates. 28 U.S.C. 1346(b)(1).

Respondent also cites examples of "loss" being accompanied by a modifier, such as "intentional." Br. 27 (emphasis omitted). But contrary to respondent's contention (Br. 27-28, 34-35), those examples do not show that a modifier is necessary for "loss" to refer to wrongful conduct. Indeed, they prove the opposite. Those examples show that, because the ordinary meaning of "loss" already encompasses *both* wrongful *and* negligent conduct, a modifier is necessary to distinguish one type of conduct from the other. So, for example, a criminal statute might use the word "unlawfully" or "willfully" to single out intentional losses as punishable. See Resp. Br. 28. Or an insurance contract might use the word "intentional" to exclude such losses from coverage. See *id.* at 27. If respondent's view of "loss" were correct, there would be no need for such a contract to exclude "intentional" losses, since they would not be covered "losses" in the first place. But such exclusions are common, which is unsurprising: As a matter of ordinary English, an insurance contract for "loss" of property would cover a third party's intentional destruction of the property, absent the type of express qualification that respondent highlights.

Here, Congress wanted to encompass *both* intentional *and* negligent losses in the postal exception, so it chose to use the word "loss" without qualification. See *Kemp* v. *United States*, 596 U.S. 528, 534 (2022) (adopting similar reasoning in interpreting "unqualified" use of the word "mistake"). Had Congress wanted to single out negligent losses, it could have inserted the modifier "negligent"—as it did elsewhere in the postal exception.

See Gov't Br. 35. And contrary to respondent's contention (Br. 27-28), pre-FTCA decisions often used the word "loss," without qualification, to refer to deprivations caused intentionally. See, *e.g.*, *Boerner*, 117 F.2d at 388 ("losses of postal matter through [postal employee's] thefts"); *Martin* v. *United States*, 280 F. 513, 514 (4th Cir. 1922) ("losses of mail" caused by mail carrier's thefts); *Pearson*, 13 F. at 387-388 ("loss" caused by postmaster's "withhold[ing]" of "letters" until recipient "establishe[d] his identity").

C. Respondent Cannot Justify Giving "Loss" A Different Meaning In The Postal Exception Than In The Sovereign-Immunity Waiver

Finally, respondent's attempts to justify giving "loss" a different meaning in the postal exception than in the sovereign-immunity waiver—where "loss" plainly refers to deprivations caused intentionally or negligently —lack merit.

Respondent observes (see Br. 35) that the phrase "caused by the negligent or wrongful act" appears after the word "loss" in the sovereign-immunity waiver, but not after the word "loss" in the postal exception. 28 U.S.C. 1346(b)(1). But what that phrase does in the sovereign-immunity waiver is clarify the meaning of "loss"—making plain that "loss" is being used in its ordinary sense, as encompassing both wrongful and negligent conduct. The presumption of consistent usage then counsels in favor of giving "loss" in the postal exception the same meaning. Far from rebutting that presumption, the fact that the phrase "caused by the negligent or wrongful act" is not repeated in the postal exception simply underscores the work that the presumption is doing.

Respondent nevertheless argues (Br. 35) that the two provisions should be understood as asking different

questions. Respondent acknowledges (*ibid.*) that, for the sovereign-immunity waiver, "the question is: 'Did the Government *cause the loss* of the property?'" But she contends (*ibid.*) that, for the postal exception, "the question is: 'Did the Government *lose* the letter or postal matter?'" As our opening brief explains (at 39-42), however, nothing in the text of the postal exception justifies converting the noun "loss" into the verb "lose." And disregarding Congress's word choice would create the following anomaly: Respondent's "loss of medical records, and loss of access to time-sensitive mail," Pet. App. 53a, would qualify as a "loss" under the sovereign-immunity waiver, but not as a "loss" under the postal exception.

Respondent similarly contends (Br. 32) that, for the postal exception's "negligent transmission" prong, the question is "whether the postal employees negligently transmitted the mail"—not "whether 'postal employees caused' the negligent transmission of the mail." But respondent offers no support for that contention. Given that the postal exception delineates what this Court has described as "three types of harm (loss, miscarriage, and negligent transmission)," *Dolan*, 546 U.S. at 490, it is natural to ask whether the government caused each type—*i.e.*, whether it caused the loss, miscarriage, or negligent transmission.

In any event, converting each noun into a verb does not work even with respondent's own preferred definitions. For example, she defines (Br. 9, 26) "loss" to mean "damage." But if a postal employee were to *damage* a package—say, by "le[aving] [it] out in the rain" (Resp. Br. 41)—no one would say that the employee *lost* the package. Respondent also defines (Br. 13-14) "negligent transmission" to mean negligently fail to transmit. But if a postal employee negligently *failed to transmit*

a letter, no one would say that the employee negligently *transmitted* it. Given that converting each noun into a verb does not yield the right answers even for respondent, there is no reason to treat the operative question as whether the government *lost* the mail, rather than whether the government caused, or the plaintiff suffered, a *loss* of mail.

III. RESPONDENT'S INTERPRETATIONS OF "LOSS" AND "MISCARRIAGE" REFLECT A FLAWED APPROACH TO THE POSTAL EXCEPTION AS A WHOLE

Respondent's interpretations of "loss" and "miscarriage" are not just wrong in isolation. They reflect three fundamental flaws in her approach to the postal exception as a whole.

A. Respondent Errs In Assuming That Each Prong Of The Postal Exception Has A Separate Ambit

To begin, respondent's interpretations of "loss" and "miscarriage" rest on the flawed premise (Br. 9) that each prong of the postal exception should be given a "separate ambit." When Congress enacted the postal exception, "loss" and "miscarriage" were understood to be overlapping terms. Many pre-FTCA decisions used "loss" and "miscarriage" interchangeably—sometimes in the same sentence—to describe a failure of mail to arrive. See, *e.g.*, *Heinrich*, 113 N.E. at 531-532 (Cardozo, J.) (discussing the "loss of the checks," which had "miscarried in the mails"); *Hayden* v. *Chemical Nat'l Bank*, 84 F. 874, 877 (2d Cir. 1898) ("If a letter miscarries, * * * the loss of its contents will fall upon the party who has assumed the risk of its transition."); *Kirkman & Luke* v. *Bank of Am.*, 42 Tenn. 397, 406 (1865) (discussing the "miscarriage of the letter and loss of the note" within the letter).

Despite that overlap, Congress included both "loss" and "miscarriage" in the postal exception. Congress did so presumably because it desired a belt-and-suspenders approach. See *Pugin* v. *Garland*, 599 U.S. 600, 609-610 & n.3 (2023). If Congress had included only "miscarriage," that could have risked the argument that respondent is making now—that "miscarriage" refers only to mail going to the wrong address and does not encompass the mail's failure to arrive for other reasons (such as destruction or misplacement). Including "loss" thus ensured that the postal exception would cover any failure of the mail to arrive at its proper destination. Conversely, if Congress had included only "loss," the postal exception would not have covered cases in which the mail arrived at its proper destination, but arrived late or damaged. Including "miscarriage" thus ensured that the postal exception would cover delayed or damaged mail. Finally, given that "miscarriage" tends to connote intentional misconduct, including only "loss" and "miscarriage" could have risked the argument that the postal exception does not reach delay or damage caused negligently. See Gov't Br. 16-17. Including "negligent transmission" preempted that argument.

As this Court has recognized, see *United States* v. *Neustadt*, 366 U.S. 696, 702, 706-707 & n.16 (1961), Congress adopted a similar belt-and-suspenders approach in the FTCA's intentional-tort exception, which covers both "misrepresentation" and "deceit," even though they overlap. 28 U.S.C. 2680(h); see Gov't Br. 17 n.3. And in *Dolan*, the Court gave no indication that it thought each prong of the postal exception should be given a separate ambit. To the contrary, the Court observed that "both" "'los[s]'" and "'miscarri[age]'" "refer to failings in the

postal obligation to deliver mail in a timely manner to the right address." *Dolan*, 546 U.S. at 487.

Respondent therefore errs in assuming that Congress meant to give each prong of the postal exception a separate ambit. She further errs in suggesting (Br. 21, 38) that, by rejecting that assumption, the government's interpretation would give the postal exception a breadth inconsistent with the rest of the statutory scheme. The government's interpretation is the same as *Dolan's*: that the postal exception covers "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. As *Dolan* recognized, that interpretation respects Congress's decision to draw the postal exception more narrowly than other FTCA exceptions and to allow the United States to be held liable for auto accidents and slip and falls caused by postal employees. *Id.* at 487-489.

B. Respondent Errs In Contending That The Failure To Transmit Mail Is Addressed By The "Negligent Transmission" Prong

In applying her separate-ambit approach, respondent commits a further error: She incorrectly contends (Br. 13-15) that the failure to transmit mail is addressed by the "negligent transmission" prong of the postal exception. According to respondent (Br. 11), Congress borrowed the term "negligent transmission" from the telegraph context. And respondent asserts (Br. 13) that a telegraph company's negligent failure to transmit a message was understood to be a form of "negligent transmission."

But the decisions respondent cites (Br. 13) do not support that proposition. To be sure, each involved a claim that a company had "negligently failed to transmit"

a message. *Postal Telegraph-Cable Co.* v. *Kennedy*, 81 So. 644, 644 (Miss. 1919) (citation omitted); see *Burnett* v. *Western Union Tel. Co.*, 39 Mo. App. 599, 602 (1890). But the decisions did not describe that failure as "negligent transmission." Rather, "negligent transmission" generally referred to cases in which a message was transmitted to the right recipient, but was transmitted late or with transcription errors due to the telegraph company's negligence. See, *e.g.*, *Suchomajcz* v. *United States*, 465 F. Supp. 474, 476 (E.D. Pa. 1979); *Western Union Tel. Co.* v. *Landry*, 108 S.W. 461, 462-463 (Tex. Civ. App. 1908).

Respondent therefore errs in putting failures to transmit (or deliver) mail in the ambit of the postal exception's third prong. She then leverages that error through the separate-ambit theory, using it to justify distorting the meanings of "miscarriage" and "loss" so that they do not cover the same failures.

Accordingly, even under an approach that tried to give each prong of the postal exception a separate ambit (though that would be misguided, see pp. 18-20, *supra*), there is a less misguided way than respondent proposes. Namely, "loss" would cover mail that cannot be located, such as mail that was misplaced or destroyed, whether because of allegedly wrongful or negligent conduct; "miscarriage" would cover mail that was carried to the wrong place, including mail that was returned to sender or detained at the post office, whether because of allegedly wrongful or negligent conduct; and "negligent transmission" would cover mail that reached its proper destination, but arrived late or damaged because of allegedly negligent conduct (similar to what "negligent transmission" covered in the telegraph context). The difference between that approach and the one the government has

advocated above is that it would not preserve the United States' immunity for claims arising out of mail that *arrived late or damaged* because of allegedly *wrongful* conduct. But that alternative approach is still less ill-advised than respondent's, which would undermine the postal exception to an even greater degree, by exposing the United States to the much larger set of claims arising out of the failure of mail to reach its proper destination because of allegedly wrongful conduct.

C. Respondent Errs In Downplaying The Disruption That Her Interpretation Would Cause

Finally, respondent contends (Br. 43) that even if her interpretation of the postal exception would permit plaintiffs to pursue FTCA claims against the United States merely by alleging that postal employees acted intentionally in failing to deliver the mail or to deliver it properly, many potential plaintiffs will lack the "economic incentives" to do so. But as our opening brief explains (at 24), the Postal Service each year handles billions of pieces of mail and receives hundreds of thousands of complaints from customers alleging misconduct by letter carriers. Even if only an exceedingly small percentage of those customers brought lawsuits, the result would be highly disruptive. Gov't Br. 23-24. The Postal Service currently handles only about 900 FTCA suits per year, most of which involve auto accidents and slip and falls, as Congress intended. *Ibid.* The number of suits would increase drastically—as would the burdens on the Postal Service and its mission—if the postal exception were construed to permit suits like respondent's.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.*

Respectfully submitted.

D. JOHN SAUER
Solicitor General

SEPTEMBER 2025

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* If this Court reverses the court of appeals' interpretation of the postal exception, it should remand for application of the correct interpretation to respondent's claims, including consideration of whether respondent forfeited her contention (Br. 47-49) that some of her claims do not arise out of the "loss" or "miscarriage" of mail even under the government's interpretation. See Gov't Br. 15 (noting respondent's acknowledgement below that her claims arise solely out of the alleged failure to deliver the mail).