

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES POSTAL SERVICE,)
ET AL.,)
Petitioners,)
v.) No. 24-351
LEBENE KONAN,)
Respondent.)

Pages: 1 through 73
Place: Washington, D.C.
Date: October 8, 2025

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5 Petitioners,)
6 v.) No. 24-351
7 LEBENE KONAN,)
8 Respondent.)
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10
11 Washington, D.C.

12 Wednesday, October 8, 2025

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 11:50 a.m.

17
18 APPEARANCES:

19 FREDERICK LIU, Assistant to the Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf
21 of the Petitioners.

22 EASHA ANAND, ESQUIRE, Menlo Park, California; on
23 behalf of the Respondent.

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25

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1 P R O C E E D I N G S

2 (11:50 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-351, United States
5 Postal Service versus Konan.

6 Mr. Liu.

7 ORAL ARGUMENT OF FREDERICK LIU
8 ON BEHALF OF THE PETITIONERS

9 MR. LIU: Mr. Chief Justice, and may
10 it please the Court:

11 The postal exception to the Federal
12 Tort Claims Act preserves the United States'
13 immunity for any claim arising out of the loss,
14 miscarriage, or negligent transmission of mail.
15 Respondent alleges that her mail didn't reach
16 its destination because postal employees
17 intentionally withheld the mail and returned it
18 to sender.

19 That allegation falls within the
20 postal exception for two reasons. First,
21 Respondent alleges a miscarriage of mail. When
22 Congress enacted the FTCA in 1946,
23 "miscarriage" had a specific meaning in the
24 mail context. It meant the failure of
25 something sent to arrive or to be carried

1 properly. Indeed, pre-FTCA decisions used
2 "miscarriage" to describe the facts alleged
3 here, mail that wasn't delivered because it was
4 intentionally returned to sender.

5 Second, Respondent alleges the loss of
6 mail. Her own complaint uses the word "loss,"
7 and she doesn't dispute that she alleges a loss
8 for purposes of the FTCA's sovereign immunity
9 waiver. There's no reason to give "loss" a
10 different meaning in the postal exception. In
11 fact, the presumption of consistent usage,
12 contemporaneous dictionaries, and pre-FTCA
13 decisions all support reading "loss" to have
14 the same meaning.

15 Respondent's claims, therefore,
16 satisfy two out of the postal exception's three
17 prongs, which is no surprise given that "loss"
18 and "miscarriage" were understood to be
19 overlapping terms when Congress enacted the
20 FTCA. Respondent's contrary view that her
21 claims satisfy none of the exception's prongs
22 can't be reconciled with that historical
23 understanding or with Congress's
24 belt-and-suspenders approach to protecting
25 postal operations from disruptive damages

1 suits.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Mr. Liu, what would
4 we -- what should we do if we find ourselves in
5 equipoise on this?

6 MR. LIU: Well, I -- I would hope
7 because -- I would hope that the -- there were
8 enough votes that there was a judgment as to
9 whether the facts here fall within the
10 exception, even if there's some disagreement
11 about which particular prong it fell in, and
12 that that bottom-line judgment would control
13 the disposition.

14 JUSTICE THOMAS: Do we give any
15 special weight because this is a waiver of
16 sovereign immunity?

17 MR. LIU: Well, this Court in Dolan
18 rejected the notion that the exception should
19 be interpreted differently because it
20 implicates a waiver of sovereign immunity. We
21 haven't taken issue with that here.

22 We do think, if there is a tie-breaker
23 sort of canon at play, it is the canon that
24 rules that govern jurisdictional issues -- and
25 sovereign immunity, of course, is a

1 jurisdictional issue -- that those rules should
2 be made as simple as possible.

3 And, in our view, we've submitted the
4 most simple rule. It's simply the rule this
5 Court articulated on page 4 -- 489 of Dolan,
6 which is that injuries arising directly or
7 consequentially from the mail not arriving at
8 all or from the mail arriving late or damaged
9 or to the wrong address, fails to get to the
10 right address, that those are the types of
11 injuries that are covered and it doesn't extend
12 any further.

13 CHIEF JUSTICE ROBERTS: But a loss
14 doesn't typically convey -- I mean,
15 technically, I suppose it can -- malfeasance
16 involved. I mean, if I say I lost my car,
17 people aren't going to think somebody stole his
18 car. They're going to think I forgot where it
19 was or -- or something like -- like that. In
20 other words, it doesn't say something bad has
21 happened other than, you know, your own, you
22 know, fact of paying attention to something.

23 If somebody said I lost my -- I lost
24 the mail, I -- I would not think necessarily --
25 I wouldn't think right away somebody stole it.

1 MR. LIU: Well, our -- our submission,
2 Mr. Chief Justice, isn't that "loss"
3 necessarily encompasses malfeasance or
4 intentionally conduct -- intentional
5 misconduct, just that it can refer to it.

6 And -- and we know it can refer to --
7 to both intentional or unintentional conduct
8 because, for one thing, Congress used it that
9 way. In Section 1346(b)(1), which is the
10 FTCA's principal provision, the provision that
11 Respondent has to get through just to be able
12 to assert a claim, Congress used the phrase
13 "loss of property" and then made clear that
14 those losses encompass deprivations caused
15 intentionally or negligently by federal
16 employees.

17 JUSTICE GORSUCH: But, Mr. Liu, if you
18 agree that "loss" doesn't generally refer to
19 intentional actions and, as the Chief Justice
20 said, generally doesn't refer to them, but we
21 all admit it can, what do we do with negligent
22 transmission? Why bother with that if loss
23 covers that? There's a lot of surplusage in --
24 in your reading of this statute.

25 MR. LIU: So --

1 JUSTICE GORSUCH: Not just with "loss"
2 but with "miscarriage" too for that matter. So
3 help me out.

4 MR. LIU: So -- yeah. So I'm happy to
5 go through it. With respect to your specific
6 question about any overlap between "loss" and
7 "negligent transmission," we don't think
8 there's any overlap there. We think "loss"
9 covers any deprivation, outright deprivation,
10 of mail, just I didn't get the mail, and
11 "negligent transmission" covers I did get the
12 mail, but I got it late or I got it damaged.
13 So we don't think there's any overlap there.

14 You're right that there is overlap in
15 other parts of -- of --

16 JUSTICE GORSUCH: Like "miscarriage."

17 MR. LIU: "Miscarriage." And --
18 and -- and we think what Congress presumably
19 was thinking --

20 JUSTICE GORSUCH: Maybe with
21 "negligent transmission" too if transmission
22 might include something more than it -- it
23 arrived, if it means it didn't arrive through
24 negligence, it wasn't fully transmitted
25 properly.

1 MR. LIU: That's why we need --

2 JUSTICE GORSUCH: So there's --
3 there's -- there is still surplusage there too,
4 honestly, I think, but -- but certainly with
5 "miscarriage."

6 MR. LIU: Well, the -- the way I
7 would --

8 JUSTICE GORSUCH: And -- and if we
9 have any presumptions about statutory
10 interpretation, it's generally to try and give
11 effect to each of these words, right?

12 MR. LIU: That -- that's right, but I
13 think, in this case, you know, the Court has
14 said that's not the be all/end all. And I
15 think, in this case, it would be wrong to apply
16 the -- the surplusage canon here because we
17 know what the historical meanings of these
18 words were in 1946. Judicial decisions like
19 the opinion by -- by Judge Cardozo on the New
20 York Court of Appeals used these change -- used
21 some of these terms interchangeably.

22 JUSTICE GORSUCH: All right.

23 MR. LIU: He referred --

24 JUSTICE GORSUCH: I'll let you go with
25 this one then. If we're going to go back to

1 1946 --

2 MR. LIU: Yeah.

3 JUSTICE GORSUCH: -- there was a big
4 distinction between, gosh, I mean, boy, between
5 "miscarriage" and "detention," right? And this
6 doesn't strike me as a miscarriage case in
7 1946. This strikes me as a detention case in
8 1946. If we're going to play -- go back -- and
9 I'm -- we should.

10 MR. LIU: Yeah.

11 JUSTICE GORSUCH: It was an important
12 case, but this doesn't strike me as
13 miscarriage. If we're going to go to 1946
14 under your regulations, it's -- it's a
15 detention case.

16 MR. LIU: Well, two responses to that.
17 I think, just as a definitional matter, there's
18 a difference between "miscarriage" and
19 "detention." Miscarriage implies that
20 something bad happened to the mail. Detention
21 might be a perfectly appropriate thing to do to
22 the mail.

23 But the second point I'd make -- and
24 this goes to the historical usage -- is that
25 there are cases, and we cite them on page 7 of

1 our reply brief, where mail getting stuck at
2 the post office, i.e., being detained at the
3 post office, is referred to a miscarriage.
4 That's the Cardozo case. There, the mail got
5 stuck behind a radiator at the post office.
6 And the way Judge Cardozo described it was that
7 the -- the checks in the mail had miscarried
8 for that reason.

9 JUSTICE JACKSON: So --

10 JUSTICE KAVANAUGH: Mr. Liu, Justice
11 Gorsuch raises an important point about the
12 surplusage. On the other hand, I guess
13 Congress often drafts things to be redundant
14 and overlap, and ordinary people communicate
15 that way, particularly when they're giving
16 instructions to. So both, you know, Congress
17 would much rather have overlap than leave a
18 hole.

19 MR. LIU: Exactly. And I think there
20 are two strong --

21 JUSTICE KAVANAUGH: But how do we
22 know -- but, at the same time, we do have the
23 surplusage --

24 MR. LIU: Right.

25 JUSTICE KAVANAUGH: -- canon. I mean,

1 the Eskridge book says it's often unrealistic.
2 The Scalia book says, you know, sometimes
3 drafters do repeat themselves and do include
4 words that add nothing of substance. And I
5 think that's right, but how do we tell --

6 MR. LIU: Yeah. I -- I --

7 JUSTICE KAVANAUGH: -- which is which?

8 MR. LIU: -- I think, here, there are
9 three clues as to why Congress embraced a
10 belt-and-suspenders approach. One is the
11 historical ordinary meaning and understanding
12 of these terms.

13 If you look at the dictionaries and
14 the dictionaries that existed in 1946, these
15 are overlapping terms, and Congress included
16 them in this statute anyway.

17 The second point I would point to is
18 the way -- the way Congress approached the
19 intentional tort exception, which is in
20 2680(h).

21 There, Congress used overlapping
22 terms. It included both "deceit" and
23 "misrepresentation," even though, as this Court
24 pointed out, in page -- Footnote 16 of
25 Neustadt, deceit encompassed all kinds of

1 misrepresentation. That was the understanding
2 in the Restatement (First) of Torts.

3 And the last thing I'd point to is
4 the importance that Congress attached to the
5 postal exception. This was not an afterthought
6 exception. This was an exception that was in
7 the earliest drafts of the FTCA. It's the very
8 second exception listed. And you can
9 understand why, in 1946, when writing a letter
10 was the only way to communicate in writing,
11 that Congress would have wanted to protect that
12 postal function.

13 JUSTICE SOTOMAYOR: Counsel, let's
14 assume that your definition of "miscarriage" --
15 because this is what I'm assuming -- you define
16 it as a failure to carry the mail properly.
17 Then "loss" to me and "negligent transmission"
18 are redundant and useless.

19 Congress knew in the customs duties --
20 custom-handling exception, which we looked at
21 in Kosak, how to write a very broad exception
22 that covered everything, intentional and
23 unintentional conduct, but it didn't. It chose
24 very particular words here.

25 And so let me give you some examples

1 I'm troubled by, why they would have imagined
2 that intentional malfeasance would be accepted
3 by this.

4 By the way, I think intentional
5 malfeasance often will be covered by a
6 different exception in the FTCA.

7 In some -- in many, some are
8 discretionary. In others, they're outside the
9 scope of employment. There's a lot of other
10 exceptions that cover a lot of the intentional
11 misconduct.

12 But I'm troubled by this: A postal
13 worker refuses to deliver any mail-in ballots
14 from a county he associates with a certain
15 political view, or, on Election Day, the postal
16 worker postmarks some ballots but not others
17 because he's favoring one side or another.

18 This is a miscarriage, isn't it?

19 MR. LIU: Yes.

20 JUSTICE SOTOMAYOR: Okay. So that's
21 exempted.

22 What about when a postal employee
23 writes harassing messages on an individual's
24 piece of mail every day that he delivers it?

25 MR. LIU: I don't --

1 JUSTICE SOTOMAYOR: You are a thief.
2 You're a baby killer. Whatever other harassing
3 messages you want.

4 That's a miscarriage. He's not
5 carrying the mail properly.

6 MR. LIU: I'm struggling with that
7 because the -- there's -- there's not really
8 anything bad that's happened to the mail in the
9 sense that the mail is getting there on time.
10 It's getting there. The contents are -- are
11 not damaged. It's getting to the right
12 address.

13 JUSTICE SOTOMAYOR: But he's not
14 carrying it properly, is he?

15 MR. LIU: Well, I -- I -- I -- I
16 think, when -- when it's being carried
17 properly, it's referring to the duty that --
18 the duty of carriage that the post office has
19 to both the sender and the recipient.

20 JUSTICE SOTOMAYOR: And -- and that
21 includes not letting the mail intentionally be
22 damaged. You've got to --

23 MR. LIU: Yeah, I think that -- I
24 think that would be the key question --

25 JUSTICE SOTOMAYOR: All right. How

1 about when -- how about a postal --

2 MR. LIU: -- in that hypothetical,
3 whether you could count that as damage.

4 JUSTICE SOTOMAYOR: How about when a
5 postal employee refuses to take a person's mail
6 in a rural community. There's a post office
7 there. There's -- he's supposed to do it. But
8 he forces her to drive 30 minutes one way to a
9 post office who will take her mail.

10 MR. LIU: If -- if it's a situation
11 where the sender has dropped off the mail and
12 the post office --

13 JUSTICE SOTOMAYOR: No, don't -- don't
14 qualify it. He just doesn't like this person,
15 refuses --

16 MR. LIU: Oh. No, no, we don't -- if
17 the mail hasn't entered the mail system --

18 JUSTICE SOTOMAYOR: Well, it's there.

19 MR. LIU: No.

20 JUSTICE SOTOMAYOR: But he's refusing
21 to take it to her. That's a miscarriage
22 according to your definition.

23 MR. LIU: I don't think so because I
24 think this implicates the line that this Court
25 drew --

1 JUSTICE SOTOMAYOR: Counsel, you're
2 fighting the hypotheticals because you
3 recognize, I think, that inherent in using the
4 word "negligent transmission" there is a sense
5 that Congress is using this as a verb to start
6 with and that Congress is looking at these
7 situations in their generally accepted terms.
8 As Justice Gorsuch said, generally, we think of
9 loss as negligence.

10 Miscarriage, in all the cases you
11 cite, they all involved non-intentional conduct
12 except for one, which was a case 50 years
13 before which really didn't have to do with
14 miscarriage. It was a claim between newspapers
15 or a newspaper claiming that the post office
16 should have selected it to transmit a message
17 and not someone else. And so, even in that
18 case, it wasn't really a miscarriage of the
19 advertisement. It was a failure-to-deal case.

20 So I guess I'm having a problem with
21 your starting proposition, which is that these
22 terms have to encompass both intentional and
23 unin- -- or negligent conduct.

24 MR. LIU: Yeah. So, with the
25 unintentional -- unintentional line, I would

1 make three quick points.

2 One is that if you look at the
3 traditional legal authorities, we look at the
4 evidence of common usage at the time of 1946,
5 none of those authorities draw a line between
6 intentional and unintentional.

7 That's true of the dictionaries.
8 That's true of the decisions. We cite on
9 page 9 a number of decisions that use
10 "miscarriage" intentionally, to refer to
11 intentional conduct.

12 Later in our reply brief, we have
13 examples of --

14 JUSTICE SOTOMAYOR: If all of those
15 cases could be distinguished, do you lose?

16 MR. LIU: I don't think so. I mean,
17 you know, we cite a decision involving loss
18 that involves a postal employee stealing the
19 mail. I can't think of anything more willful
20 than that.

21 JUSTICE SOTOMAYOR: Well, that would
22 be outside the scope of his duties, so that
23 would be exempted under a different exception.

24 MR. LIU: Well, but I think it still
25 goes to what the ordinary meaning of "loss" was

1 at the time. Maybe another part of the FTCA
2 would kick it out, but our point is that "loss"
3 had a settled historical meaning and it covered
4 intentional conduct.

5 JUSTICE KAGAN: So, Mr. Liu, I mean,
6 this is "loss" in a particular context. So
7 there are three things, basically, that the
8 Postal Service can do to your letters that
9 we're not going to allow you to sue about.

10 So here are the three things.

11 They can negligently transmit your
12 letters, and we're not going to allow you to
13 sue about that.

14 Or they can lose your letters, lose
15 your letters there, definitely not intentional.
16 It's like you lost your keys, you lost your
17 pen, they lost your letters. We're not going
18 to allow you to sue about that.

19 And then there's this "miscarriage"
20 word that's stuck in the middle of them that's
21 kind of like, ooh, what does that mean? They
22 miscarried your letters. It seems kind of a
23 weird word.

24 But I think I agree with you when you
25 said these are supposed to be overlapping and

1 there's -- it's not a big deal if there's some
2 redundancy here. I think that this is -- if
3 you look at this statement, it's kind of words
4 are known by the company they keep.

5 On one side, they're losing your
6 letters. On the other side, they're
7 negligently transmitting your letters. And on
8 the other side, they're miscarrying your
9 letters. And miscarrying basically has the
10 same kind of meaning, which is they did
11 something mistakenly with respect to your
12 letters. And that's the way that seems most
13 natural to me to read this sentence.

14 MR. LIU: And I would say a few things
15 in response.

16 One is I think that noscitur intuition
17 works only if you -- as I think your premise of
18 your question did -- buy in that "loss" refers
19 only to unintentional conduct. We think that
20 contradicts the meaning of "loss" in the FTCA's
21 sovereign immunity waiver, and there's
22 really --

23 JUSTICE KAGAN: Yeah, I don't think
24 that that's an argument that works because, if
25 you look at the sovereign immunity waiver, it's

1 using "loss" in an entirely different way and
2 context. It says the district court shall have
3 jurisdiction over claims for injury or loss of
4 property or personal injury or death.

5 So there, "loss" is functioning as
6 just like one of a number of different kinds of
7 harms that a person can suffer and bring suit
8 about.

9 But this is, like, losing your mail.
10 That's what this is about. And when you lose
11 your mail, you don't, like, destroy your mail
12 or tear up your mail or purposefully put them
13 in the trash chute. You lost your mail. They
14 lost your mail. The Postal Service lost your
15 mail. Sorry, you can't sue about that.

16 MR. LIU: But I -- I -- I think -- I
17 think that setup reveals one of the debates, is
18 who -- who lost what. I think it is quite
19 natural to say that Respondent lost her mail.
20 Indeed, she uses that same phrase --
21 phraseology in her --

22 JUSTICE KAGAN: Oh, this has got to
23 be, Mr. Liu, that the post office is doing
24 these things. The post office is negligently
25 transmitting, the post office is miscarrying,

1 and the post office is losing your mail. And
2 notwithstanding that the post office did all
3 those things to you, you can't sue.

4 MR. LIU: I -- I don't think -- I
5 don't think there's a reason to shift
6 perspective from the waiver to the exception.
7 I think --

8 JUSTICE KAGAN: You're -- you're --
9 these are three parallel terms. You're
10 shifting perspective from "loss" as opposed to
11 "miscarriage" or "negligently" -- or "negligent
12 transmission." These three terms are the terms
13 that have to be read in parallel form. The
14 post office is doing these three things to your
15 mail, and you can't sue about any of them.

16 MR. LIU: Well, Your Honor, I think
17 the better way to read them is that these are
18 three harms, just as in the waiver, "loss" --
19 "loss" is paired with injury in the waiver.
20 "Loss" is paired here with two other types of
21 more specific terms that describe injury to
22 mail, i.e., "miscarriage" and "negligent
23 transmission."

24 Your Honor suggested that if you
25 translated them into verbs, there's some

1 parallel structure. That's actually not true.
2 I mean, no one in 1946 would have said the
3 government miscarried the mail. The mail never
4 took the government or the postal worker as its
5 subject. The mail -- when "miscarry" is used
6 as a verb, it takes the mail as its subject.

7 JUSTICE JACKSON: Okay. But, Mr. --

8 MR. LIU: And that's -- and that's
9 because, for -- for a reason Respondent points
10 out on Footnote 19 of her brief, "miscarriage"
11 is an intransitive verb. Just as you wouldn't
12 say the government arrived the mail --

13 JUSTICE JACKSON: Mr. --

14 MR. LIU: -- so too you wouldn't say
15 the government miscarried it.

16 JUSTICE JACKSON: I'm sorry. Go
17 ahead.

18 MR. LIU: And so there really is
19 nothing to be gained from trying to convert
20 these nouns into verbs. There is no single --

21 JUSTICE JACKSON: Okay.

22 MR. LIU: -- consistent way you can do
23 it.

24 JUSTICE JACKSON: So, if I accept --
25 if I accept that textual reading and I also

1 even start by accepting your argument that the
2 Postal Service -- or the postal exception
3 immunizes intentionally caused losses and
4 miscarriages, those harms happening to people
5 could be intentional -- let's say I start
6 there.

7 MR. LIU: Right.

8 JUSTICE JACKSON: I guess I don't
9 understand why all of Ms. Konan's claims here
10 would be immunized under that exception. She
11 has four claims here --

12 MR. LIU: Correct.

13 JUSTICE JACKSON: -- only potentially
14 one of which it seems to me even relates to the
15 failure of her mail to arrive as the gravamen
16 of her claim. The way we think about torts is
17 people are bringing claims alleging that
18 wrongful conduct or, you know, negligent
19 conduct by the defendant is a breach of duty of
20 care that has harmed them or breached --
21 breached a duty that harmed them.

22 And I guess what I'm suggesting is
23 that she's got claims here that really aren't
24 about the loss of the mail, right? So they're
25 not key to the failure of her mail to arrive.

1 So the intentional infliction of emotional
2 distress claim, for example, seems related to
3 her claim that postal employees carried out a
4 campaign of racial harassment with respect to
5 how they treated her mail.

6 And, yes, we have the "my mail never
7 arrived" as an allegation, but that's not her
8 claim when it comes to intentional infliction
9 of emotional distress. So I'm wondering why,
10 even if you're right, she doesn't get to go
11 forward on at least that claim.

12 MR. LIU: So we think this is an issue
13 that can be left on remand. Our -- the
14 principle we're trying to vindicate here is
15 simply the legal standard.

16 JUSTICE JACKSON: Mm.

17 MR. LIU: And I don't think the Court
18 really needs to --

19 JUSTICE JACKSON: So you're not saying
20 that Postal Service knocks out her IIED claim?

21 MR. LIU: We're not asking the Court
22 to decide that.

23 JUSTICE JACKSON: Okay.

24 MR. LIU: I think that's an issue that
25 can be left for remand. On remand, we will

1 make that argument.

2 JUSTICE JACKSON: Okay.

3 MR. LIU: And we'll also make the
4 argument that Respondent has forfeited any --
5 any contention that all her claims --

6 JUSTICE JACKSON: All right. So going
7 to the -- going to the particular argument of
8 the -- a claim -- assuming she has a claim in
9 her complaint that actually is about the mail
10 not arriving, as opposed to her IIED claim or
11 her tortious interference claim -- those seem
12 like they're talking about other things -- I
13 guess I go back to Justice Sotomayor's
14 suggestion that your argument indicates that
15 Congress would -- would have intended to
16 immunize a Postal Service worker who tears up a
17 person's rent check or, you know, Social
18 Security check in front of them on their porch
19 right there intentionally. So it didn't -- you
20 know, it doesn't get delivered. And you're
21 saying, yes, that's in the exception?

22 MR. LIU: Yeah. And I don't think
23 that should come as a surprise. Congress
24 immunized all sorts of intentional conduct in
25 the FTCA's exceptions. So, in the intentional

1 tort exception, it immunized assault and
2 battery and misrepresentation.

3 JUSTICE JACKSON: Yeah, but there has
4 to be a reason that makes sense. And so
5 they -- the whole thing is Congress -- the FTCA
6 is Congress authorizing tort claims to be
7 brought against the government. This is an
8 exception. And so the exception kind of has to
9 make sense.

10 MR. LIU: Yeah.

11 JUSTICE JACKSON: And I guess what I'm
12 trying to figure out is why Congress would
13 have -- we understand why Congress would have
14 wanted to immunize negligent loss of the mail,
15 miscarriage. First of all, that happens all
16 the time.

17 MR. LIU: Right.

18 JUSTICE JACKSON: And you could
19 imagine a rational Congress saying we just
20 can't run a post office if everybody whose
21 mail, you know, catalogue didn't get delivered
22 can sue us, so we're not going to allow that.
23 That makes perfect sense.

24 What is hard to get one's mind around
25 is, in a statute in which Congress was

1 authorizing tort liability, that a classic
2 scenario in which the mail is actually being
3 intentionally damaged, lost, not delivered,
4 they also meant --

5 MR. LIU: Yeah.

6 JUSTICE JACKSON: -- to take that off
7 the table.

8 MR. LIU: So two -- two points. One
9 is that Respondent's rule is so broad in how it
10 determine -- how it identifies intentional that
11 it would encompass not just the willfully
12 malicious hypos that Your Honor gave but also
13 routine application of postal regulations.

14 Every day, the Postal Service
15 intentionally withholds mail either because it
16 can't identify the addressee, because it thinks
17 a residence is vacant, because it thinks the
18 mail --

19 JUSTICE JACKSON: I understand, but
20 the question is how do -- which -- which
21 overbroad rule are we going to go with? You're
22 saying, because that's the case, we should
23 allow the tear-up scenario to occur, that
24 Congress could have wanted that. And I
25 don't -- I guess I don't understand why we --

1 MR. LIU: Well, that -- that gets to
2 my next point --

3 JUSTICE JACKSON: Yeah.

4 MR. LIU: -- which I think, as to the
5 egregiously willful conduct, Congress -- if I
6 may finish, Mr. Chief Justice -- Congress made
7 the same judgment in the postal exception as it
8 did in -- in the intentional tort exception and
9 indeed some of the other exceptions that --
10 that are far broader than the postal exception,
11 which is that these damages suits aren't a good
12 way for identifying who the bad actors are.

13 It may well be that there are
14 allegations that something willfully wrong
15 happened. We're going to want to present
16 evidence to refute that. It's going to be
17 burdensome to the post -- Postal Service and --
18 and -- and to other parts of the government.
19 And Congress didn't think this was the right
20 way to go about identifying those cases.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Well, as for the

1 possible reason for immunizing intentional
2 conduct, the answer that I took from your brief
3 was that allowing that would open the door to
4 too many lawsuits, and it would undermine the
5 immunization for the negligent transmission of
6 the mail. So I don't get my Christmas cards
7 until three weeks after Christmas, and I can't
8 sue on the ground that it's negligent, but if I
9 say, well, the -- the delivery person doesn't
10 like me for one reason or another, it was
11 intentional, and then I'm in -- I'm in court.

12 MR. LIU: Yeah, no, that -- that's
13 true. I mean, we're talking about over 300
14 million pieces of mail delivered a day. We get
15 over 300,000 complaints about the conduct of
16 letter carriers a year. If -- if even
17 1 percent of those complaints results in a
18 lawsuit, the number of suits that the Postal
19 Service faces each year is going to quadruple.

20 And as Your Honor's question suggests,
21 things like intent are easy to allege and hard
22 to disprove. It may well be at the end of the
23 day we're going to be able to show that some
24 alleged instance of intentional misconduct was,
25 indeed, just a mistake. But, at that point,

1 we've defeated the purpose of having an
2 immunity from suit, which was to relieve the
3 Postal Service of the burden of having to take
4 postal -- postal workers away from their
5 day-to-day jobs and force them to become
6 witnesses in court.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, you are
10 forgetting, however, that there's a requirement
11 of good-faith allegations. Merely saying
12 someone dislikes me is not enough, correct?

13 MR. LIU: That's right, and I think --

14 JUSTICE SOTOMAYOR: Now, putting that
15 aside, so much else is -- as I pointed out,
16 would be exempted by other provisions, correct?

17 MR. LIU: I -- I don't think a lot
18 of -- any of the other provisions is really
19 going to address this problem, especially
20 the -- the -- Congress's preference for these
21 suits to be -- for this immunity to be an
22 immunity from suit.

23 JUSTICE SOTOMAYOR: I go back to they
24 could have said very simply anything having to
25 do with mail delivery is out. But they used

1 something different than they did in customs.

2 MR. LIU: Oh, but, to be clear, our
3 position isn't that the exception should be
4 read any broad -- more broadly than the Court
5 read it in Dolan. Dolan -- the Court in Dolan
6 limited the exception.

7 JUSTICE SOTOMAYOR: No, no. But --
8 but what else wouldn't be covered? Even in
9 Dolan, I'm not sure how, accepting your
10 definition of "miscarriage," we could have
11 ruled the way we did and placed any limitation,
12 because placing a package on the porch, not
13 near the door, or on a step is a failure to
14 properly carry the mail. You're supposed to
15 deliver to the recipients and not to a porch
16 step.

17 MR. LIU: No. We -- we read Dolan
18 to -- to say that these three terms -- and the
19 Court described them as harms on page 490 --
20 these three harms are harms in the sense that
21 they are bad things that happen to the mail.

22 And I think the -- what the line the
23 Court was drawing in Dolan is that if you're
24 alleging a bad thing that happens to someone
25 around the mail or just to something else,

1 you're outside the scope of the exception. But
2 what's clearly within the exception are bad
3 things that happen to mail. It doesn't arrive
4 or it arrives, but it's damaged or it's late.

5 And all we're saying is that's our
6 simple rule. There's no more fine-grained
7 analysis about why the mail didn't get there.

8 JUSTICE SOTOMAYOR: Yeah. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

11 JUSTICE GORSUCH: Briefly, not to
12 belabor the point, Mr. Liu, but just following
13 up on Justice Sotomayor's point.

14 Would these three terms as you read
15 them cover the waterfront of anything having to
16 do with deliver the mail so the government is
17 effectively totally immunized, intentional,
18 non-intentional actions in the delivery of the
19 mail?

20 MR. LIU: It would immunize us only as
21 to bad things that happen to the mail --

22 JUSTICE GORSUCH: And --

23 MR. LIU: -- not as to auto
24 accidents --

25 JUSTICE GORSUCH: No, I understand

1 your Dolan point, but putting aside the Dolan
2 point, in the -- in the delivery of mail, it
3 would immunize everything?

4 MR. LIU: Correct.

5 JUSTICE GORSUCH: Okay.

6 MR. LIU: So long as we're not
7 including in delivery what the Court rejected
8 in Dolan.

9 JUSTICE GORSUCH: Dolan, yeah, okay.

10 Isn't it an odd way to do it, though,
11 to have three terms rather than just to say
12 that?

13 MR. LIU: I don't think so because
14 these were the terms that was in the vocabulary
15 in 1946. And if you compare the terms here to
16 the terms of the -- of the waiver, all Congress
17 is doing is coming up with two words,
18 "miscarriage" and "negligent transmission,"
19 to -- to describe injury to mail. It's covered
20 loss of mail by using the word -- same word,
21 "loss" and now it --

22 JUSTICE GORSUCH: I understand the
23 point. Thank you. Appreciate it.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: On Dolan, it's got
2 a pretty straightforward sentence summarizing
3 what it thought the rule would be. I mean,
4 what -- deviating from that, what do you --
5 response? Should we -- what -- what concerns
6 would you have about deviating from what the
7 Court said in 2006?

8 MR. LIU: Well, I think it would be a
9 sea change in how the government has approached
10 the postal exception from the very outset.
11 The -- the way the Court described it in Dolan
12 was to capture bad things that happen to mail
13 and to leave the United States open to
14 liability for other things, including
15 slip-and-falls and auto accidents.

16 And when you look at the composition
17 of the cases that the Postal Service faces each
18 year, it's about 900 cases. About 800 of them
19 are about auto accidents, and another 70 or so
20 are about slip-and-falls, and then there's a
21 smaller category of other.

22 But I think, if you look at that
23 composition of cases, you would say the postal
24 exception is working exactly how Congress
25 intended. The main core function that I was

1 discussing with Justice Gorsuch is protected.
2 And these other types of injuries that aren't
3 about bad things happening to the mail are
4 allowed to go forward in these lawsuits.

5 I think, if you accept Respondent's
6 rule, which would be to disregard the rule
7 articulated in Dolan, we're into a universe, as
8 Justice Alito suggested, where we're going to
9 be faced with, I think, a ton of suits about
10 mail. And they're not all going to be bad
11 faith. They're going to be plaintiffs who
12 simply aren't in a position to know what
13 happened to their mail and they're just not
14 going to give the government the benefit of the
15 doubt. They're going to infer that their mail
16 didn't arrive because of a rude comment that
17 they heard or -- or what have you.

18 And that's going to lead to discovery,
19 a trial on what actually happened to that mail,
20 which we think is going to be quite burdensome.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: In the case -- in

1 the cases that you just described, though,
2 isn't that the work of Iqbal and Twombly in
3 terms of the government's response?

4 I mean, there -- if a plaintiff is
5 just saying my mail -- the claim is my mail
6 didn't arrive, that was harmful to me, I'm
7 suing the post office, that seems to be
8 heartland postal exception. I don't think
9 anybody disagrees with that.

10 But, if there's some allegation about
11 intent with respect to the mail's not arriving,
12 I would think there would have to be plausible
13 allegations that there was some intent on the
14 part of the post office and it would -- the
15 delivering person and surely the government
16 would not concede to go to trial over that
17 issue just because the person says in their
18 complaint my post -- postal worker intended not
19 to deliver it to me.

20 MR. LIU: That -- that -- that's true.
21 We -- we -- we certainly would file a motion to
22 dismiss.

23 JUSTICE JACKSON: So the real, like,
24 worry is in these, I would assume, rare cases.
25 I mean, I can't imagine that the postal workers

1 are, you know, actually actively, intentionally
2 withholding people's mail on a regular basis.
3 So I just don't know how many cases we're
4 talking about here.

5 MR. LIU: Well, that -- that's part of
6 the point I was making before. As a matter of
7 routine, the Postal Service intentionally
8 hold -- withholds people's mail for all sorts
9 of legitimate reasons.

10 JUSTICE JACKSON: Well, that's an easy
11 defense then. I mean, there it is. And it's
12 not intentional in the sense of a harm.

13 MR. LIU: It's an easy defense --

14 JUSTICE JACKSON: Yeah.

15 MR. LIU: -- once we've had discovery.
16 It's not an easy defense when we're trying to
17 fight off a complaint because, from the
18 outside, that intentional withholding can
19 easily be mistaken for something else.

20 JUSTICE JACKSON: All right. Let me
21 ask you about a hypothetical because I -- I'm
22 looking at your "miscarriage" definition and
23 you define "miscarriage" as the fail -- failure
24 of a mail -- the mail to arrive and you say
25 even intentionally caused failures to arrive

1 would be covered.

2 So let's say we have a mother who
3 regularly writes her son who's in the military,
4 and a postal employee maliciously,
5 intentionally, and repeatedly returns her mail
6 as undeliverable and stamps Deceased on it.

7 Could she sue for intentional
8 infliction of emotional distress under those
9 circumstances? You're saying your case doesn't
10 cover intentional infliction of emotional
11 distress.

12 MR. LIU: Right. I -- I don't -- I --
13 I think the postal exception would deem that as
14 a miscarriage of mail. And, in fact, there are
15 cases, believe it or not, from 1946 and before
16 where an erroneous message is delivered like
17 deceased.

18 JUSTICE JACKSON: Yeah.

19 MR. LIU: And the plaintiff wants to
20 recover consequential damages for that. And I
21 think that is -- that is the heartland of -- of
22 what --

23 JUSTICE JACKSON: Even -- even though
24 she also meets the elements of IIED under those
25 circumstances, that this is an extreme and

1 outrageous intentional act that causes her
2 emotional distress?

3 You're saying this would -- this --
4 even though that's a separate claim, it's not
5 really about what happened to the mail, you're
6 saying that would be covered? That's what I'm
7 worried about with Ms. Konan.

8 MR. LIU: Right. Well, the -- the --
9 this implicates a different part of the postal
10 exception. And the language of the postal
11 exception begins "any claim arising out of the
12 loss, miscarriage, or negligent transmission."
13 And if the damages, the injuries being
14 asserted, the emotional distress arises out
15 of --

16 JUSTICE JACKSON: Yeah, but I think
17 you would have a Dolan problem if you did this.
18 We'll -- we'll -- we -- I -- I'll figure it
19 out. Thank you.

20 MR. LIU: Okay. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Anand.

24

25

1 ORAL ARGUMENT OF EASHA ANAND
2 ON BEHALF OF THE RESPONDENT

3 MS. ANAND: Mr. Chief Justice, and may
4 it please the Court:

5 Three things I want to highlight about
6 the government's presentation. First, they did
7 not dispute that no ordinary speaker of English
8 would ever say Rojas lost Ms. Konan's mail.
9 Now they point to 1346(b). That is
10 specifically worded differently. The question
11 there is did the government employee cause the
12 loss. That's not how 2680(b) is worded.

13 Second, the government has produced
14 exactly zero examples, no cases, no books, no
15 newspaper articles, of miscarriage of mail
16 being used by an everyday speaker of English to
17 describe wrongful conduct on the part of the
18 postal worker, that is, postal workers choosing
19 to put the package in the wrong place, not just
20 intentional in the sense of I put it on the
21 doorstep but didn't fall out of my bag, but I
22 thought it was at the right doorstep, right?

23 We've never said, the Fifth Circuit's
24 never said, no one has ever said that that is
25 not a miscarriage but in the sense of wrongful,

1 which is our test for miscarriage.

2 Third, my friend didn't dispute that
3 on the government's reading, the term
4 "miscarriage" renders both the term "loss" and
5 the term "negligent transmission" entirely
6 superfluous.

7 So he says belt and suspenders. This
8 is like not just two terms that is some
9 overlap, but it's like belt and belt buckle,
10 they're two terms that are completely
11 overlapping. And even if we interpreted
12 statutes that way, the government story for why
13 Congress would do this makes no sense, right?

14 If Congress is worried about
15 "miscarriage" somehow being underinclusive,
16 it's worried about "miscarriage" only covering
17 the negligence stuff. All right? We give an
18 unbroken string of examples from Henry the
19 VIII, oh, negligence fit for a fool to fall by,
20 to romance novels to cases. Everyday speakers
21 of English use "miscarriage" to refer to
22 negligent conduct.

23 And so, if you wanted a belt-and-
24 suspenders "miscarriage," the term you add in
25 is not "negligent transmission." It's

1 something to do with wrongful conduct.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: What do you do with
4 Mr. Liu's argument that the waiver of immunity
5 did not include things -- bad things that
6 happened to the mail? He said that generally.
7 And that Dolan, because it wasn't about bad
8 things happening to the mail, was outside the
9 waiver of immunity?

10 MS. ANAND: So I think that's just
11 a --

12 JUSTICE THOMAS: I'm sorry, was
13 included in the waiver.

14 MS. ANAND: I -- I understood.

15 JUSTICE THOMAS: Yeah.

16 MS. ANAND: Thank you, Justice Thomas.
17 So I think that's just an over-reading
18 of Dolan. So the sentence says -- that -- that
19 he points to says something like, as a general
20 rule, these sorts of damages don't lie. It's
21 using that hedging language because, again, as
22 a general rule, we're talking about good-faith
23 mistakes. We're not talking about the rare
24 instance where a postal worker is using the
25 mail to effectuate harassment on somebody.

1 So I think even taking that sentence
2 of Dolan at face value, right, wrongful conduct
3 was not before the Court in Dolan, but even as
4 it was covering that, I think that's what the
5 phrase, the general rule is doing.

6 And I suppose I would say that feels
7 passing strange given the rest of the statute
8 and its emphasis on kind of specifically
9 carving out property-related torts. So, for
10 instance, 2680(h), the so-called intentional
11 tort exception, conspicuously omits conversion
12 and trespass, the two property torts.

13 And so I think what my friend on the
14 other side is saying is no one in the federal
15 government can engage in conversion and be
16 exempt from -- and have the United States be
17 exempt from liability except for postal
18 workers.

19 JUSTICE THOMAS: Is there a long
20 history of Federal Tort Claims Act suits about
21 the mail itself, delivery, non-delivery, loss?

22 MS. ANAND: So there are some cases.
23 We'll note that kind of in response to Justice
24 Jackson's question, most of those don't even
25 get into court under 1346(b). If you just say

1 my package doesn't show up, it gets kicked out
2 of court because the -- you haven't even
3 plausibly alleged negligence, let alone
4 wrongful conduct, right?

5 JUSTICE THOMAS: But you would think
6 that, with 300 million pieces of mail per day,
7 you would have a significant number of suits
8 that do -- that do involve this level of harm.

9 MS. ANAND: So I think you may have
10 some number of suits that involve this level of
11 harm, meaning enough to prompt someone to go to
12 court and sue.

13 JUSTICE THOMAS: Yeah.

14 MS. ANAND: But not that involve
15 wrongful conduct within the scope of
16 employment, right? That's a very narrow needle
17 to thread. Think about what Ms. Konan alleged
18 here, right? Two years of non-delivery, not
19 just a one-off package. She has filed
20 administrative complaint after administrative
21 complaint. She can say, look, every single one
22 of my neighbors is getting mail. She says,
23 when you found out I owned this other property,
24 mail stopped getting delivered there. She's
25 got all this other kind of circumstantial

1 evidence that doesn't have to do with the mail
2 delivery.

3 Those sorts of allegations, I think,
4 will be rare. And you know, remember, the
5 government came before you in Dolan and said,
6 if you rule for Petitioner, frivolous claims
7 will inundate the Postal Service. A decade
8 later, they're coming and saying, actually the
9 postal exception is working just as it should.
10 And so I'd be a little bit hesitant to believe
11 those claims.

12 JUSTICE BARRETT: Ms. Anand, I think
13 -- I -- I would really like to hear you address
14 the presumption of consistent usage point in
15 the waiver and exception because I think that's
16 a harder argument for you because when you
17 describe loss of property, loss of mail,
18 whatever, as the kind of damage that it can
19 cover intentional and negligent torts. Now,
20 you handled that in your brief, but I would
21 just like to hear you talk about it a little
22 bit more because I think that is one of the
23 hard parts of your argument.

24 MS. ANAND: Sure. So we don't think
25 the presumption applies, and if it applies,

1 it's overcome.

2 So we don't think it applies because
3 that presumption is where two words are being
4 used in the same sense about the scope, right?
5 So "interest" in the Internal Revenue Code. If
6 it's talking about the stuff you get when you
7 leave your money in the bank, in both places it
8 must cover compound interest or in neither
9 place. But that doesn't mean that in the
10 Internal Revenue Code someone can't use
11 "interest" to mean, you know, present interest
12 in an estate, right? A claim or entitlement.
13 The presumption of consistent usage says if
14 both terms are being used in the same sense,
15 then they cover the same terrain.

16 Here we submit that it's clear that
17 "loss" in 1346(b) is being used in a different
18 sense, the deprivation sense, than in 2680(b).
19 And our kind of three textual clues for that,
20 the first is that in 1346(b), there's a
21 specific reference to wrongful conduct on the
22 part of the government employee.

23 Second, the sentence is structured
24 differently, right? It's asking, did the
25 government employee cause the plaintiff to lose

1 property, not just if the government employee
2 lost property.

3 And, third, as the government itself
4 acknowledges on page 11 of its reply, "loss of
5 property" is something of a term of art. And
6 when used that way, loss of property, "loss"
7 invariably means deprivation.

8 JUSTICE KAVANAUGH: Your reading of
9 that sentence from Dolan to Justice Thomas I
10 thought was a bit aggressive on the -- on the
11 -- the general rule.

12 MS. ANAND: Okay.

13 JUSTICE KAVANAUGH: I mean, I -- the
14 Court was there specifically distinguishing the
15 general rule from the -- like, having a
16 case-by-case determination. I thought it was
17 articulating a general rule, but that would
18 apply across the board.

19 But -- but, more importantly, kind of
20 statutory stare decisis, even if that doesn't
21 formally apply, just we set forth the rule and
22 Congress hasn't changed it. And this would
23 come, I think as a little bit of a surprise to
24 Congress, which would probably have to address
25 it pretty quickly. Thoughts?

1 MS. ANAND: So -- so let me take each
2 in turn, Dolan and then why I don't think this
3 is a surprise to Congress.

4 So, on Dolan, you know, that sentence
5 has a lot of hedging language, right? It also
6 says we think it more likely that Congress
7 intended to remain immunity. And so even if
8 you think the Court was even contemplating
9 wrongful conduct, right, I think that that
10 hedging language does a lot of work.

11 And if you're going to take that
12 sentence in Dolan and say it was thinking of
13 kind of all cases, I think you also have to
14 take the part of Dolan where they say loss is
15 destroyed or misplaced, and miscarriage is
16 delivery to the wrong address, neither of which
17 we fall into.

18 On the Congress-would-be-surprised
19 point, you know, I don't think so. Again,
20 Congress specifically did not put conversion,
21 for instance, in the FTCA's waiver provision.
22 Every other kind of intentional tort, assault,
23 battery, libel, slander, all that stuff,
24 there's an exception for. There's no exception
25 for conversion.

1 And so I think Congress would actually
2 be surprised in the other direction if this
3 Court were to say conversion, liability if
4 anyone else does it, but not if the Postal
5 Service does it.

6 JUSTICE JACKSON: So, Ms. Anand, I
7 guess I'd like to get your thoughts on the
8 theory that I shared with Mr. Liu, which is
9 that in the context of a broad statute that is
10 authorizing tort claims against the government,
11 could it be that what Congress was actually
12 doing with the postal exception was just
13 immunizing the Postal Service for liability for
14 a particular claim?

15 If your tort claim has as its gravamen
16 the loss, miscarriage, or negligent
17 transmission of mail, I'm seeking damages
18 because that happened to my mail, that's out,
19 says Congress. This is my theory. But
20 anything else that you are saying, even though
21 it involves perhaps as an allegation that those
22 things happened, if your claim is not that,
23 then that's in.

24 I kind of thought that's what Dolan
25 was doing because in Dolan, I guess, there was

1 an allegation that there was the negligent
2 transmission of mail in the sense that it was
3 put on the step in the wrong place, and if she
4 had just come in with no step -- you know, and
5 just said the gravamen of my tort claim, the
6 reason why they breached a duty and did
7 something wrong, was because they negligently
8 transmitted my mail, maybe that's out.

9 But Dolan says no, her claim was
10 really a slip-and-fall claim. It's a different
11 kind of tort. And so if that's the theory, I'm
12 asking you, is Ms. Konan's four -- she has four
13 claims. Are they all making the kind of "I'm
14 suing you because you've lost, miscarried or
15 negligently transmitted my mail" claim?

16 MS. ANAND: No, Your Honor. Three of
17 the four certainly aren't. Conversion maybe,
18 though as I've explained I think it -- it's a
19 very weird result if you say that conversion
20 falls out.

21 And, you know, as -- as we pointed out
22 at the BIO stage, that makes this a very
23 strange case to think about the meaning of loss
24 and miscarriage because, again, the gravamen of
25 the harm here is, as you note, the kind of

1 campaign of racial harassment.

2 JUSTICE JACKSON: Which fits, it
3 seems, in the tort -- I mean, there are tort
4 elements here for intentional infliction of
5 emotional distress that is just the defendant
6 acted intentionally or recklessly, the conduct
7 was extreme and outrageous, and the actions
8 caused the plaintiff emotional -- severe
9 emotional distress.

10 MS. ANAND: That's right. And we
11 think so too with our nuisance claim and so too
12 with our intentional interference with
13 prospective economic relations.

14 JUSTICE JACKSON: Thank you.

15 MS. ANAND: Now, I do want to say I
16 think that our conversion claim goes forward as
17 well because, again, I think at the point where
18 the government doesn't give you any examples of
19 an ordinary speaker of English -- I'm happy to
20 address the reply nine examples; Justice
21 Sotomayor, I don't even think Foster is such an
22 example, the one case you pointed to -- where
23 they've given you no examples of an ordinary
24 speaker of English saying miscarriage of mail
25 and meaning the postal worker did something

1 wrong, I -- I don't see how you can -- how you
2 can decide that our conversion claim doesn't go
3 forward as well.

4 JUSTICE KAVANAUGH: If -- if
5 miscarriage is -- I'm sorry.

6 JUSTICE ALITO: Go ahead.

7 JUSTICE KAVANAUGH: Are you sure? No,
8 go ahead?

9 JUSTICE ALITO: All right. I wanted
10 to shift from "miscarriage" to "loss."
11 "Miscarriage" is more a term of art.

12 But it's not clear to me why a claim
13 arising out of the loss of property cannot
14 include intentional -- a loss that results from
15 intentional conduct. That's just not the way
16 the term is normally used.

17 A claim arising out of a loss does not
18 have to involve property that has been lost in
19 the sense that it can't be found. It just
20 means that there's been a deprivation in the
21 value of the property. Right?

22 I can submit -- suppose vandals set
23 my car on fire and I submit a claim to my
24 insurance company. That is a claim arising out
25 of the loss of my car, even though I know where

1 my car is. It's in front of my house. But
2 it's a burned-out hulk, right?

3 MS. ANAND: Yes, Your Honor. But we
4 would never say, this is Justice Kagan's point,
5 that the vandals lost your car, right? And
6 that's the way that this -- this sort of whole
7 statute is structured.

8 JUSTICE ALITO: No, but it doesn't.
9 It says -- it doesn't talk about what somebody
10 has done. It talks about the consequences of
11 something, which is any claim arising out of
12 the loss.

13 MS. ANAND: So I think that this is
14 sort of consistent throughout the statute.
15 It's not just that you would have to prove an
16 assault happened in the abstract. You have to
17 prove the government assaulted you, right? And
18 so here it's, the government lost your mail.

19 Now, even if you don't agree with
20 me on that, I think if you agree with me on
21 "miscarriage" that resolves the question.

22 So that is, even if in some settings
23 "loss" covers wrongful conduct, I don't think
24 we have any story for why Congress would say
25 wrongful conduct not counted under miscarriage,

1 wrongful conduct not counted under negligent
2 transmission, but --

3 JUSTICE ALITO: Well, that's your
4 surplusage argument. And, you know, the
5 surplusage canon is of value, but it's not the
6 way Congress always reads -- always writes
7 statutes. It's not the way people always talk.
8 So it's valuable, but it's worth only so much.

9 But I'm -- I'm really troubled by how
10 you extract from -- how you read into the
11 phrase "any claim arising out of a loss" to
12 exclude intentional conduct.

13 MS. ANAND: So just to clarify, I just
14 want to make clear, that's not actually our
15 super-fluidity argument.

16 What I'm saying is, if you accept our
17 miscarriage mens rea argument then I think
18 you've got -- you either have to accept that
19 loss is limited to negligent conduct or you've
20 got a situation where, okay, postal worker
21 takes a hammer to a package. Scenario 1, he
22 just breaks off the handle of the mug.
23 Scenario 2, he totally shatters the mug.

24 Scenario 1, the government says that's
25 not a loss, he just broke off the handle of the

1 mug, and so it's one or the other two terms.

2 So wrongful conduct and so, therefore,
3 it's not immunized from any liability.

4 JUSTICE ALITO: That's a --

5 MS. ANAND: And then --

6 JUSTICE ALITO: -- different -- that's
7 a different question about whether the loss of
8 the mail means the loss of all value of the
9 mail or a diminution in the value of the mail.

10 MS. ANAND: That's right. But
11 Congress could not have wanted liability to
12 turn on that fine a distinction.

13 And if you say loss, but only loss
14 covers wrongful conduct, right, miscarriage,
15 negligent transmission exclude wrongful
16 conduct, then at that point what we are saying
17 is Congress wanted liability to turn, in a case
18 involving wrongful conduct, on this kind of
19 fine distinction, between destruction, loss,
20 wrongful conduct covered, and diminution, not
21 loss, wrongful conduct not covered.

22 JUSTICE KAVANAUGH: Assume --

23 JUSTICE ALITO: Go ahead.

24 JUSTICE KAVANAUGH: If -- if
25 miscarriage does cover wrongful conduct, so

1 let's assume that which is contrary to what
2 you have been assuming, but assume miscarriage
3 covers intentional wrongful conduct, then your
4 arguments are?

5 MS. ANAND: So assuming, again,
6 contrary to --

7 JUSTICE KAVANAUGH: Yeah, I got -- my
8 --

9 MS. ANAND: -- the mountain of
10 evidence --

11 JUSTICE KAVANAUGH: I'm reserving, and
12 you're not conceding anything. You're not
13 conceding anything. Yeah.

14 MS. ANAND: Then I think our fallback
15 position is that you have to think about --
16 basically argue Dolan, right? Dolan says
17 loss is destroyed or potentially misplaced.
18 Miscarriage is delivery to the wrong address.

19 We are neither of those two. So we
20 are some kind of transmission error.

21 At common law this would be called
22 a willful refusal to transmit or a wrongful
23 transmission. We give you case cites for that.

24 Congress conspicuously doesn't include
25 willful refusal to transmit in this list. It's

1 only negligent transmission.

2 So I think we still win, but I think
3 if you decide for us that miscarriage only is
4 limited to negligent conduct, you don't have to
5 get into the kind of fine distinctions between
6 the three terms.

7 If I may make one other point about
8 the kind of structure of the FTCA.

9 So the FTCA's exemptions are divided
10 into kind of two categories.

11 Some are very broad, right? Any
12 activities of the Tennessee Value Authority,
13 fiscal operations of the Treasury, that sort of
14 thing.

15 The others list specific actions often
16 with a mens rea, right? So 2680(a), you know,
17 executing a statute with due care, 2680(h),
18 battery but not negligent touching.

19 This one, 2680(b), as Dolan said is,
20 clearly in the latter mold, right? It's not
21 saying any activities of USPS, any failings in
22 the postal obligation, any mail handling
23 activities. It's not doing that.

24 It's listing three specific terms
25 pegged to a mens rea the way the other

1 provisions do throughout the FTCA.

2 JUSTICE BARRETT: Can I ask you a
3 question about Mr. Liu's point that
4 "miscarriage" wasn't used as a verb at the time
5 the statute was enacted?

6 You know, Justice Kagan said, well,
7 you know, you can lose the mail, you can
8 negligently transmit the mail if you're the
9 postal worker, or you can miscarry the mail, as
10 in, you know, misdirect it to the wrong place.

11 And one of the responses that Mr. Liu
12 had to that point was, well, miscarry wouldn't
13 have been used as a verb. It was this term of
14 art.

15 What's your response to that? Because
16 I do think it matters whether you view these
17 words as something that happens to the
18 recipient or something that was done by the
19 postal worker.

20 MS. ANAND: Right. So I'll say -- so
21 I'll answer your mis- -- the miscarry question,
22 then I want to say one more word about that.

23 So he's right that, in general, it was
24 seen as intransitive, but the Webster's First
25 and Webster's Second dictionaries we point to

1 note that it was sometimes used transitively.

2 So you could say -- I mean, in fact,
3 Dolan says mail is miscarried if it goes to the
4 wrong place.

5 I'm not sure it matters a ton. You
6 can kind of rephrase the question to get at the
7 agent in a different way. You can say did the
8 letter miscarry by Rojas? Was the mail lost by
9 Rojas? And I think you're still in the same
10 place.

11 And I think whatever you think about
12 "miscarriage," it has to be clear that all the
13 other nouns throughout the exceptions are not
14 just, did this happen, it's did the government
15 employee do this, right?

16 We give the example of assault. You
17 would never -- you don't come into court and
18 say, like, there was an assault. You have to
19 say the government employee assaulted someone.
20 And so we think the same thing is true of loss.

21 Again, if you don't buy that argument,
22 I think the two other ways to think about the
23 "loss" term, the first is sort of what we say
24 in our brief, which is that typically loss is
25 thought of as unintentional.

1 And whether it's insurance contracts
2 or cases or 1346(b) itself, people usually
3 specify intentional loss or loss caused by
4 wrongful conduct when they meant to change that
5 default.

6 And second, again, if you buy our
7 miscarriage mens rea argument, there's just
8 no good reason why Congress is saying one term
9 encompasses wrongful conduct and the other two
10 don't, particularly where, as Mr. Liu noted,
11 there's some redundancy and certainly some
12 overlap among the terms.

13 I can -- if I can make one other point
14 about consistent usage, and then I'll turn it
15 over to seriatim questioning.

16 In 1346(b), Congress is using "loss"
17 in just a fundamentally different sense than it
18 is in 2680(b). We know that because of the
19 three textual clues that I gave you.

20 And as a result, I don't think that
21 the presumption of consistent usage even
22 attaches, because it's only about where two
23 terms are both being used to mean, for
24 instance, deprive and deprive, the same source
25 of deprivations count.

1 It doesn't say that any time a term
2 is used it must be used in the same sense.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 JUSTICE ALITO: Do you want to say
8 something in response to Mr. Liu's point
9 about the consequences of adopting your
10 interpretation, which is, that it is going to
11 be very easy for people who are unhappy with
12 the delivery of mail to claim that they are not
13 getting their letters because of intentional
14 conduct as opposed to negligent conduct?

15 Is that going to be hard for people
16 to plead consistent with Rule 11?

17 I mean, a lot of people may think that
18 it's -- that what's happening is intentional.
19 I don't get my mail because I didn't give the
20 mail carrier a tip at Christmas, or I have a
21 big dog that ran up to the door and scared --
22 scared the mail carrier on one point, or I --
23 I -- I point -- I complained to the mail
24 carrier that he or she was putting my
25 neighbor's mail in my mailbox or putting my

1 mail in the mailbox of my neighbor's or she --
2 she or he looked askance at my holiday
3 decorations, or there's some characteristic
4 about me that the mail carrier doesn't like.

5 Is that going to be hard?

6 And what will the consequences be if
7 all these suits are filed and they have to be
8 litigated?

9 Is the cost of the first class letter
10 going to be \$3 now?

11 MS. ANAND: So I do think that's going
12 to be hard. So, remember, even alleging
13 negligent conduct is tricky here because if all
14 you have is my package didn't show up, you're
15 going to get kicked out of court. Certainly
16 alleging wrongful conduct -- and so, again,
17 we're not just -- I just want to clarify
18 because I think Mr. Liu's presentation may have
19 muddled these two things.

20 We're not saying intentional just in
21 the sense of, like, it didn't fall out of the
22 bag. We're saying wrongful, as in you knew you
23 were putting it in the wrong place.

24 I do think that the Iqbal standard
25 makes that quite tough. And that's

1 particularly tough, given the other FTCA
2 guardrails, right? So still has to be within
3 the scope of the employment, 2680(a), right,
4 basically says kind of mistakes of law or
5 anything that gives the government employee
6 discretion doesn't count.

7 And if there's some conduct left that
8 makes it into court, we know Congress did not
9 want to immunize USPS wholesale or even all
10 failings in the postal obligation. It knew how
11 to do that. It did that with the majority of
12 the other exceptions and didn't do so here.

13 JUSTICE ALITO: All right. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: No. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?

19 JUSTICE GORSUCH: Very quickly, I
20 promise.

21 MS. ANAND: Yep.

22 JUSTICE GORSUCH: So there are various
23 grades of mens rea.

24 MS. ANAND: Yes.

25 JUSTICE GORSUCH: You knew this was

1 coming, didn't you?

2 MS. ANAND: Uh-huh.

3 JUSTICE GORSUCH: All right. So you
4 say this is negligence. Reckless? Knowing?
5 Thoughts?

6 MS. ANAND: Right. So this is a
7 general problem with the FTCA. 1346(b) carves
8 the world into negligent and wrongful, right?
9 This is written before restatement second,
10 before the model penal code. People didn't
11 really think of recklessness as a different
12 mens rea.

13 What courts have said for purposes of
14 1346(b), right, no one said: Well, Congress
15 said negligent, and they said wrongful, so I
16 guess reckless conduct is out. What they've
17 said is at the time, you know, tort law equated
18 recklessness with gross negligence, which is a
19 species of negligence, and so recklessness kind
20 of falls under the negligence bucket.

21 I will be candid, I haven't seen
22 litigation over reckless conduct and whether or
23 not it counts as miscarriage, but I would
24 assume it would operate the same way; that is,
25 I think miscarriage covers a bunch -- covers

1 good faith mistakes, even if they are, like,
2 really bad mistakes.

3 JUSTICE KAVANAUGH: Just to follow up
4 quickly on Justice Alito's question, if you
5 allege that you exchanged words with your mail
6 -- mail carrier at one point, and so you're
7 alleging that he intentionally mis-delivered or
8 did not deliver the mail; is that enough?

9 MS. ANAND: I certainly don't think if
10 it's a -- first of all, I don't think the
11 one-off package gets into court because no one
12 is going to pay a \$400 filing fee and hire a
13 lawyer if it's, like, one package that just
14 gets --

15 JUSTICE KAVANAUGH: Well, say it's a
16 consistent slowness. You're alleging your mail
17 is delivered slowly because you exchanged words
18 with your mail carrier one time.

19 MS. ANAND: I think it depends on the
20 extent. I think if it's a -- if it's two years
21 and you can say every single one of my
22 neighbors gets their mail faster than I do, I
23 do think you get past the pleading stage.

24 JUSTICE KAVANAUGH: How about if it's
25 just a week?

1 MS. ANAND: You know, I -- I think the
2 Iqbal standard is fuzzy. I would suspect a
3 week is probably not long enough. And,
4 remember, this is not just allegations because
5 this goes to jurisdiction.

6 You know, the way that all the other
7 exceptions that turn on mens rea work is that,
8 you know, the government can demand at a very
9 early stage some sort of proof. It's not just
10 you allege and you get into court. You can do
11 jurisdictional --

12 JUSTICE KAVANAUGH: The proof will be
13 I had a negative conversation with my nail --
14 mail carrier. You're not going to know -- and
15 that my mail was delivered more slowly or some
16 important piece was not delivered at all.
17 That's all you got, but that's all you can
18 have. Is that enough? Get discovery?

19 MS. ANAND: I don't think one week
20 would be long enough. But, again, I think what
21 Dolan said in response to precisely this
22 argument, right, frivolous claims are going to
23 inundate the Postal Service. Dolan says the
24 ordinary protections against frivolous
25 litigation must suffice.

1 And it turns out in the decade since,
2 there hasn't been a problem with a flood of
3 claims, contrary to the government's
4 prediction.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: No.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 Thank you, counsel.

12 Rebuttal, Mr. Liu?

13 REBUTTAL ARGUMENT OF FREDERICK LIU

14 ON BEHALF OF THE PETITIONERS

15 MR. LIU: Thank you, Mr. Chief
16 Justice.

17 Just a few quick points. First, on
18 miscarriage, we've pointed to dictionary
19 definitions in pre-FTCA cases that show what
20 the ordinary meaning of "miscarriage" was. The
21 meaning was broad enough to encompass any time
22 the failed -- the mail failed to arrive.

23 I think the burden is really on
24 Respondent to point to something that justifies
25 giving miscarriage a narrower reading than

1 those historical sources show. She hasn't
2 pointed to anything. I think the idea that
3 miscarriage somehow incorporated some sort of
4 model penal code-esque distinction between
5 negligence all the way to willfulness is just
6 wrong.

7 Any time the courts saw the mail not
8 arriving, they labeled it a miscarriage. And
9 that's how we think Congress used it in the
10 FTCA.

11 On loss, on consistent usage, I didn't
12 hear any reasons to give loss a different
13 meaning in the postal exception than in the
14 sovereign immunity waiver. I think the main
15 reasons my friend pointed to was that there is
16 language in the waiver that doesn't appear in
17 the postal exception, but that's built in to
18 the presumption of consistent usage.

19 The -- the presumption has work to do,
20 only when the word, as it appears in provision
21 A, is clarified by language in provision A, but
22 that language doesn't appear in provision B.
23 If that language did appear in provision B, you
24 wouldn't have to apply the presumption of
25 consistent usage. This is a heartland

1 application of that presumption.

2 And the next point on loss has to do
3 with this -- this whole business of converting
4 the -- the words Congress used into -- into
5 verbs. The words work perfectly well as nouns.
6 They describe the consequences that certain
7 negligent or wrongful acts can have.

8 For miscarriage, it captures the
9 consequence of the mail not arriving, arriving
10 late, arriving damaged. Negligent
11 transmission, the mail arriving late or
12 damaged. There's just no one consistent way to
13 take Congress's language and convert it into
14 verbs.

15 And it's for the reason that Justice
16 Barrett mentioned, you can't just convert all
17 these nouns into did the government X the mail.
18 It doesn't work with miscarry because miscarry
19 wasn't used in that way. If you said that to a
20 listener in 1946, they wouldn't know what you
21 were talking about.

22 Judge Cardozo's example in Heinrich is
23 a good example. It talks about checks being
24 lost in the mail, and it says the checks
25 miscarried. And so there's no one way to redo

1 Congress's language to make sense as nouns.

2 I think what that tells us is just
3 adhere to the -- the -- the language Congress
4 used. It used nouns; treat it as nouns. And
5 if you treat "loss" as a noun, there's no
6 reason to give it a different meaning than the
7 way Congress used it as a noun in the -- in the
8 -- in the sovereign immunity waiver.

9 Finally, just a couple points on my
10 friend's approach to the exception as a whole.
11 This whole set -- separate ambit approach we
12 think is misguided. The way I would think
13 about Congress's thinking when it wrote the
14 provision was it had -- it wanted to cover loss
15 or injury to mail. Loss or injury is the --
16 the wording of the -- of the waiver.

17 And so when it got to the exception,
18 loss is a perfectly good word to use when
19 describing something that happens to mail. It
20 thought we can -- we can describe injury using
21 even more precise terms, because there are
22 words in our lexicon that describe bad things
23 that happen to mail. So it picked up
24 "miscarriage" and "negligent transmission."

25 Does this mean that miscarry -- they

1 could have -- after written the three terms,
2 just gone back and erased "loss" and "negligent
3 transmission"? I mean, maybe if they were
4 really confident in how courts would interpret
5 the language, but by including "loss" and
6 "miscarriage" in addition to -- "loss" and
7 "negligent transmission" in addition to
8 "miscarriage," Congress guarded against three
9 arguments that they were worried might have
10 narrowed the scope of the exception.

11 One is the very argument Respondent is
12 making in this case; that miscarriage should be
13 limited to mail going to the wrong place.

14 Another argument that they wanted to
15 guard against, presumably, is the argument that
16 the Fifth Circuit accepted, which is that
17 miscarriage is limited to instances where there
18 is some preceding carriage or some preceding
19 attempt at carriage.

20 And the third argument they wanted to
21 guard against was the idea that by including
22 "miscarriage," the only types of injuries to
23 mail that they were including were intentional
24 ones. And so let's use "negligent
25 transmission" as well.

1 I think our -- our position gives a
2 coherent reading to the postal exception that
3 avoids the deluge of suits that Congress was
4 trying to avoid by putting the exception in the
5 statute in the first place. And for all those
6 reasons, we would ask the Court to reverse.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:57 p.m., the case
10 was submitted.)

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Official - Subject to Final Review

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