

IN THE SUPREME COURT OF THE UNITED STATES

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 UNITED STATES POSTAL SERVICE,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 24-351
7 LEBENE KONAN,)
8 Respondent.)
9 - - - - -

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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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 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 F -- 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: Yeah. So I'm happy to go
5 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 The second point I'd make -- and this
24 goes to the historical usage -- is that there
25 are cases, and we cite them on page 7 of our

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

11 One is the historical ordinary meaning
12 and understanding of these terms. If you look
13 at the dictionaries and the dictionaries that
14 existed in 1946, these are overlapping terms,
15 and Congress included them in this statute
16 anyway.

17 The second point I'd point to is the
18 way -- the way Congress approached the
19 intentional tort exception, which is in
20 2680(h). There, Congress used overlapping
21 terms. It included both "deceit" and
22 "misrepresentation," even though, as this Court
23 pointed out, in page -- Footnote 16 of
24 Neustadt, deceit encompassed all kinds of
25 misrepresentation. That was the understanding

1 in the Restatement (First) of Torts.

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

12 JUSTICE SOTOMAYOR: Counsel, let --
13 let's assume that your definition of
14 "miscarriage" -- because this is what I'm
15 assuming -- you define it as a failure to carry
16 the mail properly. Then "loss" to me and
17 "negligent transmission" are redundant and
18 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. In some -- in
7 many, some are discretionary. In others,
8 they're outside the scope of employment.
9 There's a lot of other exceptions that cover a
10 lot of the intentional misconduct.

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

17 This is a miscarriage, isn't it?

18 MR. LIU: Yes.

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

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

24 MR. LIU: I don't --

25 JUSTICE SOTOMAYOR: You are a thief.

1 You're a baby killer. Whatever other harassing
2 messages you want.

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

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

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

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

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

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

24 JUSTICE SOTOMAYOR: All right. How
25 about when -- how about a postal --

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

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

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

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

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

17 JUSTICE SOTOMAYOR: Well, it's there.

18 MR. LIU: No.

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

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

25 JUSTICE SOTOMAYOR: Counsel, you're

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

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

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

23 MR. LIU: Yeah. So, with the
24 unintentional -- unintentional line, I would
25 make three quick points.

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

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

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

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

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

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

23 MR. LIU: Well, but I think it still
24 goes to what the ordinary meaning of "loss" was
25 at the time. Maybe another part of the FTCA

1 would kick it out, but our point is that "loss"
2 had a settled historical meaning and it covered
3 intentional conduct.

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

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

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

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

23 But I think I agree with you when you
24 said these are supposed to be overlapping and
25 there's -- it's not a big deal if there's some

1 redundancy here. I think that this is -- if
2 you look at this statement, it's kind of words
3 are known by the company they keep.

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

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

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

22 JUSTICE KAGAN: Yeah, I don't think
23 that that's an argument that works because, if
24 you look at the sovereign immunity waiver, it's
25 using "loss" in an entirely different way and

1 context. It says the district court shall have
2 jurisdiction over claims for injury or loss of
3 property or personal injury or death.

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

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

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

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

1 notwithstanding that the post office did all
2 those things to you, you can't sue.

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

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

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

23 Your Honor suggested that if you
24 translated them into verbs, there's some
25 parallel structure. That's actually not true.

1 I mean, no one in 1946 would have said the
2 government miscarried the mail. The mail never
3 took the government or the postal worker as its
4 subject. The mail -- when "miscarry" is used
5 as a verb, it takes the mail as its subject.

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

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

12 JUSTICE JACKSON: Mr. --

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

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

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

20 JUSTICE JACKSON: Okay.

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

23 JUSTICE JACKSON: So, if I accept --
24 if I accept that textual reading and I also
25 even start by accepting your argument that the

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

6 MR. LIU: Right.

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

11 MR. LIU: Correct.

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

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

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

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

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

15 JUSTICE JACKSON: Mm.

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

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

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

22 JUSTICE JACKSON: Okay.

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

1 JUSTICE JACKSON: Okay.

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

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

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

1 battery and misrepresentation.

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

9 MR. LIU: Yeah.

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

16 MR. LIU: Right.

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

23 What is hard to get one's mind around
24 is, in a statute in which Congress was
25 authorizing tort liability, that a classic

1 scenario in which the mail is actually being
2 intentionally damaged, lost, not delivered,
3 they also meant to --

4 MR. LIU: Yeah.

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

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

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

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

25 MR. LIU: Well, that -- that gets to

1 my next point --

2 JUSTICE JACKSON: Yeah.

3 MR. LIU: -- which I think, as to the
4 egregiously willful conduct, Congress -- if I
5 may finish, Mr. Chief Justice -- Congress made
6 the same judgment in the postal exception as it
7 did in -- in the intentional tort exception
8 and, indeed, some of the other exceptions
9 that -- that are far broader than the postal
10 exception, which is that these damages suits
11 aren't a good way for identifying who the bad
12 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: 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. The -- as a
7 matter of routine, the Postal Service
8 intentionally hold -- withholds people's mail
9 for all sorts 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, it 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. So he says belt and suspenders.
7 This is like not just two terms that have some
8 overlap, but it's like belt and belt buckle,
9 they're two terms that are completely
10 overlapping.

11 And even if we interpreted statutes
12 that way, the government story for why Congress
13 would do this makes no sense, right? If
14 Congress is worried about "miscarriage" somehow
15 being under-inclusive, it's worried about
16 "miscarriage" only covering the negligence
17 stuff, right? We give an unbroken string of
18 examples from Henry the VIII, oh, negligence
19 fit for a fool to fall by, to romance novels,
20 to cases. Everyday speakers of English use
21 "miscarriage" to refer to negligent conduct.

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

1 I welcome the Court's questions.

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

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

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

13 MS. ANAND: I -- I understood.

14 JUSTICE THOMAS: Yeah.

15 MS. ANAND: Thank you, Justice Thomas.

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

25 So I think even taking that sentence

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

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

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

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

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

1 of court because the -- you haven't even
2 plausibly alleged negligence, let alone
3 wrongful conduct, right?

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

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

12 JUSTICE THOMAS: Yeah.

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

1 delivery.

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

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

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

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

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

22 Second, the sentence is structured
23 differently, right? It's asking did the
24 government employee cause the plaintiff to lose
25 property, not just if the government employee

1 lost property.

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

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

11 MS. ANAND: Okay.

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

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

25 MS. ANAND: So -- so -- so let me take

1 each in turn, Dolan and then why I don't think
2 this is a surprise to Congress.

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

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

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

25 And so I think Congress would actually

1 be surprised in the other direction if this
2 Court were to say conversion, liability if
3 anyone else does it, but not if the Postal
4 Service does it.

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

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

23 I kind of thought that's what Dolan
24 was doing because, in Dolan, I guess there was
25 an allegation that there was the negligent

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

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

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

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

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

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

13 JUSTICE JACKSON: Thank you.

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

1 you can decide that our conversion claim
2 doesn't go forward as well.

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

5 JUSTICE ALITO: Go ahead.

6 JUSTICE KAVANAUGH: Are you sure?

7 JUSTICE ALITO: No.

8 JUSTICE KAVANAUGH: 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, and this is Justice Kagan's
5 point, that the vandals lost your car, right?
6 And that's the way that this -- this sort of
7 whole 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 have to prove an assault
16 happened in the abstract. You have to prove
17 the government assaulted you, right? And so,
18 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. So
22 that is, even if in some settings "loss" covers
23 wrongful conduct, I don't think we have any
24 story for why Congress would say wrongful
25 conduct not counted under miscarriage, wrongful

1 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 -- it's valuable, but it's worth only so
9 much.

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

14 MS. ANAND: So just to clarify, I just
15 want to make clear that's not actually our
16 superfluity argument.

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

25 Scenario 1, the government says that's

1 not a loss, he just broke off the handle of the
2 mug, and so it's one or the other two terms.
3 So wrongful conduct and so, therefore, it's --
4 it's not immunized from any liability.

5 JUSTICE ALITO: Well, that's a
6 different --

7 MS. ANAND: And then --

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

13 MS. ANAND: That's right. But
14 Congress could not have wanted liability to
15 turn on that fine a distinction.

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

25 JUSTICE KAVANAUGH: Assume --

1 JUSTICE ALITO: Go ahead.

2 JUSTICE KAVANAUGH: If -- if
3 miscarriage does cover wrongful conduct, so
4 let's assume that which is contrary to what
5 you've been assuming, but assume miscarriage
6 covers intentional wrongful conduct, then your
7 arguments are?

8 MS. ANAND: So assuming, again,
9 contrary to --

10 JUSTICE KAVANAUGH: Yeah, I --

11 MS. ANAND: -- a mountain of evidence,
12 no evidence --

13 JUSTICE KAVANAUGH: -- I'm reserving,
14 and you're not conceding anything.

15 MS. ANAND: Okay.

16 JUSTICE KAVANAUGH: You're not
17 conceding anything. Yeah.

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

23 We are neither of those two. So we
24 are some kind of transmission error.

25 At common law, this would be called

1 a willful refusal to transmit or a wrongful
2 transmission. We give you case cites for that.

3 Congress conspicuously doesn't include
4 willful refusal to transmit in this list. It's
5 only negligent transmission.

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

11 If I may make one other point about
12 the kind of structure of the FTCA.

13 So the FTCA's exemptions are divided
14 into kind of two categories. Some are very
15 broad, right? Any activities of the Tennessee
16 Valley Authority, fiscal operations of the
17 Treasury, that sort of thing.

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

22 This one, 2680(b), as Dolan said, is
23 clearly in the latter mold, right? It's not
24 saying any activities of USPS, any failings in
25 the postal obligation, any mail-handling

1 activities. It's not doing that.

2 It's listing three specific terms
3 pegged to a mens rea the way the other
4 provisions do throughout the FTCA.

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

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

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

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

23 MS. ANAND: Right. So I'll say -- so
24 I'll answer your mis- -- the miscarry question,
25 and then I want to say one more word about

1 that.

2 So he's right that, in general, it was
3 seen as intransitive, but the Webster's First
4 and Webster's Second Dictionaries we point to
5 note that it was sometimes used transitively.
6 So you could say -- I mean, in fact, Dolan says
7 mail is miscarried if it goes to the wrong
8 place.

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

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

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

25 Again, if you don't buy that argument,

1 I think the two other ways to think about the
2 "loss" term, the first is sort of what we say
3 in our brief, which is that, typically, loss is
4 thought of as unintentional, and whether it's
5 insurance contracts or cases or 1346(b) itself,
6 people usually specify intentional loss or loss
7 caused by wrongful conduct when they meant to
8 change that default.

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

16 If I can make one other point about
17 consistent usage, and then I'll turn it over to
18 seriatim questioning.

19 In 1346(b), Congress is using "loss"
20 in just a fundamentally different sense than it
21 is in 2680(b). We know that because of the
22 three textual clues that I gave you. And, as a
23 result, I don't think that the presumption of
24 consistent usage even attaches because it's
25 only about where two terms are both being used

1 to mean, for instance, deprive and deprive, the
2 same source of deprivations count.

3 It doesn't say that anytime a term
4 is used it must be used in the same sense.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

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

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

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

7 Is that going to be hard?

8 And what will the consequences be if
9 all these suits are filed and they have to be
10 litigated? Is the cost of a first class letter
11 going to be \$3 now?

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

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

25 I do think that the Iqbal standard

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

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

14 JUSTICE ALITO: All right. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: No. Thank you.

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

20 JUSTICE GORSUCH: Very quickly, I
21 promise.

22 MS. ANAND: Yeah.

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

25 MS. ANAND: Yes.

1 JUSTICE GORSUCH: You knew this was
2 coming, didn't you?

3 MS. ANAND: Uh-huh.

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

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

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

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

1 miscarriage covers a bunch -- covers good-faith
2 mistakes even if they're, like, really bad
3 mistakes.

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

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

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

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

25 JUSTICE KAVANAUGH: How about if it's

1 just a week?

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

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

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

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

1 litigation must suffice.

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

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: No.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 Thank you, counsel.

13 Rebuttal, Mr. Liu?

14 REBUTTAL ARGUMENT OF FREDERICK LIU

15 ON BEHALF OF THE PETITIONERS

16 MR. LIU: Thank you, Mr. Chief
17 Justice. Just a few quick points.

18 First, on miscarriage, we've pointed
19 to dictionary definitions and pre-FTCA cases
20 that show what the ordinary meaning of
21 "miscarriage" was. The meaning was broad
22 enough to encompass anytime the failed -- the
23 mail failed to arrive.

24 I think the burden is really on
25 Respondent to point to something that justifies

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

8 Anytime the courts saw the mail not
9 arriving, they labeled it a miscarriage, and
10 that's how we think Congress used it in the
11 FTCA.

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

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

1 consistent usage. This is a heartland
2 application of that presumption.

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

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

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

23 Judge Cardozo's example in Heinrich is
24 a good example. It talks about checks being
25 lost in the mail, and it says the checks

1 miscarried. And so there's no one way to redo
2 Congress's language to make sense as nouns.

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

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

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

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

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

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

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

1 transmission" as well.

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

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

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

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Official - Subject to Final Review

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