No. 24-351

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, ET AL.,
PETITIONERS

v.

LEBENE KONAN

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

REPLY BRIEF FOR THE PETITIONERS

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Respondent's brief in opposition reinforces the need for review of the court of appeals' decision. On the merits, the ordinary meaning of "miscarriage" and this Court's decision in *Dolan* v. *USPS*, 546 U.S. 481 (2006), resolve this case. Respondent primarily counters by urging the Court to ignore the statute's ordinary meaning and to dismiss much of *Dolan* as dicta. But this Court's usual interpretive methods foreclose respondent's arguments.

Respondent's effort to deny a circuit conflict fares no better. As the court of appeals here expressly recognized, the decision below is "at odds" with decisions from the First and Second Circuits. Pet. App. 9a. Respondent's suggestion that this case would be resolved the same way in those other circuits is belied by the language and reasoning of those courts' opinions.

Finally, the question presented has significant implications for the United States Postal Service's (USPS) operations. Respondent observes that few lawsuits claiming intentional theft or nondelivery of mail have been filed to date. But that is because, until the Fifth Circuit's decision below, courts had easily rejected such lawsuits under the postal exception. The decision below opens the door to a new wave of litigation against USPS —which in turn would impair the critical public service of "prompt, reliable, and efficient" mail delivery. 39 U.S.C. 101(a). The Court should grant the petition for certiorari and reverse.

A. The Decision Below Is Incorrect

The postal exception applies in this case because respondent's claims "aris[e] out of the loss[or] miscarriage * * * of letters or postal matter." 28 U.S.C. 2680(b). Respondent offers no persuasive defense of the Fifth Circuit's contrary decision.

1. Respondent's claims arise from the miscarriage of mail because she alleges that USPS did not deliver mail to two rental properties that she owned. At the time the postal exception was enacted, the ordinary meaning of miscarriage was "[f]ailure (of something sent) to arrive" and "[f]ailure to carry properly." *Webster's New International Dictionary of the English Language* 1568 (2d ed. 1942) (*Webster's*). Because respondent alleges that mail sent to her rental properties failed to arrive there, her claims "aris[e] out of the * * * miscarriage" of mail. 28 U.S.C. 2680(b).

Respondent does not dispute the principle that statutory terms should be interpreted based on the "their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd.* v. *United States*, 585 U.S. 274, 277 (2018) (citation omitted). Nor does she

dispute that the government's dictionary definitions of miscarriage capture that ordinary meaning. Instead, she takes issue (Br. in Opp. 17) with the "expansive" nature of those definitions. But this Court typically does not ignore a term's ordinary meaning simply because it is broad. And that breadth makes sense in light of Congress's intent for the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, exceptions to protect "from disruption" "important governmental functions"—here, the daily delivery of 300 million pieces of mail. *Molzof* v. *United States*, 502 U.S. 301, 311 (1992).

Respondent also has no answer for *Dolan*. There, the Court explained that the postal exception "retain[s] immunity, as a general rule," for injuries arising because mail "fails to arrive at all"; and the Court cited "personal or financial harms arising from nondelivery * * * of sensitive materials or information" as an "[i]llustrative instance[] of the exception's operation." *Dolan*, 546 U.S. at 489. This case fits squarely within *Dolan*'s illustrative example. See Pet. 12.

Respondent insists (Br. in Opp. 17) that *Dolan*'s language "is dicta at best." But while the precise issue in *Dolan* concerned the phrase "negligent transmission," 28 U.S.C. 2680(b), the Court's construction of that phrase rested on "the whole statutory text" of the postal exception, *Dolan*, 546 U.S. at 486. Indeed, the Court held that the terms "'loss' and 'miscarriage'"—the terms at issue here—"limit the reach of 'transmission.'" *Ibid.* Respondent therefore cannot escape *Dolan*.

Respondent also maintains that "'there can be no 'miscarriage'" where "there is no carriage * * * to begin with." Br. in Opp. 18 (quoting Pet. App. 7a-8a). But respondent's allegations *do* involve the carriage of mail. Specifically, respondent alleges that mail was sent to

her and her tenants; USPS carried that mail "to the Euless Post Office"; Raymond Rojas carried that mail to respondent's residences, where he delivered some mail to residents who "provided proof that they were actually living there" and "marked" some as "'undeliverable'"; and Rojas then "return[ed]" the undeliverable "mail to the Euless Post Office." Pet. App. 45a-46a. Those allegations plainly describe a miscarriage of mail—a "[f]ailure (of something sent) to arrive" and a "[f]ailure to carry properly." *Webster's* 1568.

Respondent further contends (Br. in Opp. 18-19 n.8) that her "claims arise out of Rojas's and [Jason] Drake's refusal to deliver, and it's clear that those two made no attempt at 'carriage.'" But respondent's tort claims could only properly be asserted against the United States—not against Rojas and Drake individually. Pet. App. 23a-26a. And respondent's claims focus on the conduct of not only Rojas and Drake, but also of USPS as a whole and "other of its personnel." *Id.* at 59a; see, *e.g.*, *ibid.* ("USPS has refused to deliver and has wrongfully withheld mail addressed to [respondent]."). In any event, as just explained, respondent's operative complaint alleges that Rojas carried mail from the local post office to respondent's residences, marked some of that mail as undeliverable, and then returned that undeliverable mail to the post office. Accordingly, respondent is simply wrong to assert (Br. in Opp. 19 n.8) that Rojas "made no attempt at 'carriage.'"

2. Because respondent's claims plainly arise from a miscarriage of mail, this Court would not need to address whether they also arise from a loss of mail. In any event, respondent's interpretation of "loss" is incorrect.

Contemporaneous dictionary definitions show that a loss is "*usually*"—not invariably—"unintentional[]."

Webster's 1460 (emphasis added). If Congress had intended the postal exception to cover only unintentional losses, it would have said so—as it did when it referred to "negligent transmission." 28 U.S.C. 2680(b). And *Dolan*'s statement that "mail is 'lost' if it is *destroyed*," 546 U.S. at 487 (emphasis added), clarifies that in the postal exception, a loss can arise from intentional conduct. Respondent again seeks (Br. in Opp. 16) to dismiss *Dolan*'s discussion as "dicta," but that is wrong for the reasons given above.

Ultimately, respondent's view of "loss" and "miscarriage," in conjunction, is untenable. According to respondent, the "[l]oss" of mail must be "unintentional," Br. in Opp. 15 (citation omitted), and the "miscarriage" of mail must involve delivery "to the wrong address," *id.* at 17 (citation omitted). On that view, the postal exception would not cover a plaintiff's claim that a USPS employee stole her mail. But stolen mail "fails to arrive at all"—and *Dolan* makes clear that "Congress intended to retain immunity" for claims arising from such missing mail. 546 U.S. at 489. Indeed, under respondent's view, plaintiffs who do not receive their mail can "simply recast their lost-mail claims as ones for mail theft in order to survive the jurisdictional bar, thus opening the floodgates of litigation and contravening the intent of the exclusion." *Watkins* v. *United States*, No. 02-C-8188, 2003 WL 1906176, at *5 (N.D. Ill. Apr. 17, 2003). This Court should reject that untenable interpretation of the postal exception.

B. The Decision Below Warrants This Court's Review

The decision below creates a circuit conflict and invites a wave of new litigation against USPS. Respondent offers no sound basis for denying review.

1. The court of appeals expressly recognized that its "determination that the intentional conduct in this case is not covered by the postal-matter exception puts [it] at odds with some of [its] sister circuits." Pet. App. 9a (citing decisions from the First and Second Circuits). Rather than accepting the Fifth Circuit's own assessment, respondent asserts (Br. in Opp. 7) that the circuit conflict is illusory. That is wrong.

In *Levasseur* v. *USPS*, 543 F.3d 23 (2008) (per curiam), the First Circuit held that the postal exception covers "the theft or concealment of mail" by a USPS employee, reasoning that the exception can "apply to intentional torts." *Id.* at 23-24. That holding flatly contradicts the Fifth Circuit's holding that the postal exception does *not* "appl[y] to intentional acts." Pet. App. 5a. Indeed, respondent herself acknowledges that "[t]he Fifth Circuit's reasoning turned on the notion that" the postal exception applies only to "'*unintentional*'" conduct. Br. in Opp. 9 (citation omitted).

Second Circuit precedent is likewise "at odds" with the Fifth Circuit's decision below. Pet. App. 9a. In *Marine Insurance Co.* v. *United States*, 378 F.2d 812, cert. denied, 389 U.S. 953 (1967), the Second Circuit determined that the postal exception covers claims that a parcel was "stolen while it was in the normal flow of mail." *Id.* at 815. And the Second Circuit then applied *Marine Insurance* as binding precedent in holding that the postal exception covered a claim that mail was "brought to a United States Post Office, handed to USPS employees, and stolen by persons employed by the USPS to handle mail." *C.D. of NYC, Inc.* v. *USPS*,

157 Fed. Appx. 428, 429-430 (2005), cert. denied, 549 U.S. 809 (2006).[1]

Respondent insists (Br. in Opp. 8) that the Fifth Circuit "explicitly acknowledged" that the postal exception would apply to mail theft. It did not. Instead, the court merely observed that respondent's "mail was not stolen in transit." Pet. App. 7a. And there would have been no principled way for the Fifth Circuit to conclude, on the one hand, that the postal exception does *not* "appl[y] to intentional acts," *id.* at 5a, but on the other hand, that it *does* apply to mail theft. This Court should take the Fifth Circuit at its word: In its view, the postal exception does not "appl[y] to intentional acts," *ibid.*, and as a result, the exception would not extend to the conduct in *Levasseur* and *Marine Insurance*.

Respondent also speculates (Br. in Opp. 8) that the First and Second Circuits would treat theft of mail differently from "intentional refusal to deliver mail." But there would be no logically coherent reason for those courts to draw that distinction. That is why the First Circuit expressly stated that its rule covers not only "theft," but also "concealment" and "diver[sion]" of

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[1] Contrary to respondent's assertion (Br. in Opp. 9), the Second Circuit's decision in *Birnbaum* v. *United States*, 588 F.2d 319 (1978), does not "suggest[] it would come out the same way as the Fifth" in this case. In *Birnbaum*, the plaintiffs challenged the Central Intelligence Agency's practice of "covertly open[ing]" and reading certain mail, before "return[ing it] to postal authorities for ultimate delivery." *Id.* at 321. Because the mail there was delivered to the intended recipient, the court concluded that it had not been "lost or miscarried." *Id.* at 328; see *C.D. of NYC*, 157 Fed. Appx. at 429 (explaining that "in *Birnbaum* the mail was not lost"). Here, by contrast, respondent alleges that USPS failed to deliver mail to the intended recipients. *Birnbaum* is thus "inapposite" to the issue here. *C.D. of NYC*, 157 Fed. Appx. at 429.

mail, *Levasseur*, 543 F.3d at 23—which are other ways of describing Rojas's alleged conduct in this case.[2]

2. The decision below carries important practical consequences for USPS. As the petition explains (at 20), USPS delivers more than 300 million pieces of mail per day and more than 100 billion pieces per year. Given that staggering volume, many pieces of mail will invariably be damaged, miscarried, or lost. And when that occurs in the Fifth Circuit, plaintiffs will now be able to sue USPS in federal court—and potentially proceed to burdensome discovery—so long as they allege intentional conduct by some USPS employee along the chain of carriage. In turn, that "threat of damage[s] suit[s]" would hamper USPS's ability to process and deliver mail efficiently and inexpensively. S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946).

Respondent's attempt to minimize those consequences rings hollow. Respondent notes (Br. in Opp. 10) "[t]he dearth" of cases implicating the postal exception. But such cases have arisen—and their relative infrequency presumably stems from the fact that, prior to the Fifth Circuit's decision below, it was common ground among courts that the exception can apply to allegedly intentional conduct by postal employees.[3] The Fifth Circuit

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[2] Even if the Court believed that the circuit split was only 1-1, rather than 2-1, certiorari would still be warranted. See *Dolan*, 546 U.S. at 485 (granting certiorari in light of a 1-1 circuit conflict over the scope of the postal exception).

[3] See, *e.g.*, *Trammelle* v. *United States*, No. 21-cv-1826, 2022 WL 658707, at *2 (D. Or. Feb. 7, 2022) (rejecting claim that a postal employee "intentionally converted" mail because postal exception "applies regardless whether Plaintiffs allege loss due to negligence or an intentional tort"), report and recommendation adopted, No. 21-cv-1826, 2022 WL 657408 (D. Or. Mar. 4, 2022); *Dennis* v. *Postal Serv.*, No. 12-cv-1254, 2012 WL 7037766, at *1-*2 (W.D. La. Dec. 18,

is the first court of appeals to adopt the contrary rule. See Pet. App. 9a. And as other courts have recognized, the adoption of such a rule threatens to "open[] the floodgates of litigation" against USPS, because plaintiffs can easily repackage a lost-mail claim as an intentional tort. *Watkins*, 2003 WL 1906176, at *5.

The large number of administrative complaints filed by USPS customers indicates the potential scope of the problem. See Pet. 21. While respondent confidently insists (Br. in Opp. 11) that those complaints will not "end up in federal court," there is no evident basis for such certainty. After all, millions of Americans routinely rely on USPS; some percentage of those people will inevitably become dissatisfied with USPS's mail delivery; and some percentage of those people will have the financial incentive to sue. Even a modest percentage increase in tort litigation across the vast USPS mail-delivery system would be problematic and contravene Congress's judgment that mail delivery is an activity "for which, as a policy matter, the Government should be free from tort claims." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 n.4 (1980) (per curiam).

3. Finally, this case presents a suitable vehicle in which to resolve the question presented. Both lower courts passed on that question in published opinions. The court of appeals openly grappled with the views of other circuits and then explicitly disagreed with those

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2012) (rejecting claim that a postal employee "intercepted and failed to deliver and/or destroyed" mail because postal exception may apply where the employee "acted intentionally"), report and recommendation adopted, No. 12-1254, 2013 WL 489825 (W.D. La. Feb. 7, 2013), aff'd, 564 Fed. Appx. 85 (5th Cir. 2014); *Watkins*, 2003 WL 1906176, at *1, *5 (rejecting claim that postal employee "stole or tampered with a package" because the "postal exception includes intentional torts such as theft of mail").

views. Pet. App. 9a. And if the government is correct about the question presented, then none of respondent's tort claims can proceed—which is why the district court dismissed those claims with prejudice after agreeing with the government. See *id.* at 34a-35a.

Respondent contends (Br. in Opp. 13) that this case is an unsuitable vehicle because "postal delivery" is not "the heart of the issue." But that contention flies in the face of respondent's own complaint. For instance, respondent bases her nuisance claim on USPS's alleged "refusal to deliver mail to individuals residing at the Residences" she owned, Pet. App. 57a; her tortious-interference claim on USPS's alleged "refus[al] to deliver mail to tenants residing" at those properties, *ibid.*; and her conversion claim on USPS's "refus[al] to deliver" and "wrongful[] withh[olding of] mail addressed to [her]," *id.* at 59a. In addition, respondent alleges damages stemming from lost "income relating to the Residences because tenants leave when they do not receive mail," as well as "loss of access to time-sensitive mail" of her own. *Id.* at 53a. Accordingly, contrary to respondent's implication (Br. in Opp. 13-14), this case squarely presents the question whether the postal exception applies to a claim alleging intentional nondelivery of mail.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition.

Respectfully submitted.

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