

No. 11-967

In the Supreme Court of the United States

JOAN NAJBAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's claim is one "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" under 28 U.S.C. 2680(b) and therefore is excepted from the Federal Tort Claims Act's waiver of sovereign immunity.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-10a) is reported at 649 F.3d 868. The district court's amended order granting the government's motion to dismiss (Pet. App. 11a-22a) is reported at 723 F. Supp. 2d 1132.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. A petition for rehearing was denied on November 8, 2011 (Pet. App. 23a). The petition for a writ of certiorari was filed on February 3, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the United States' sovereign immunity with respect to suits seeking damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of employees of the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA excepts 13 categories of government activity from that waiver of immunity. See 28 U.S.C. 2680. One exception preserves the federal government's immunity with respect to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). Another exception preserves the government's immunity for "[a]ny claim arising out of * * * misrepresentation." 28 U.S.C. 2680(h).

2. Petitioner alleges that she mailed a letter to her son, a soldier serving with the United States Army in Iraq, and that the letter was returned to her two weeks later, undelivered, and stamped with the word "DECEASED." Pet. App. 2a. Petitioner later learned that her son was alive. As a result of receiving the erroneously stamped letter, petitioner alleges that she suffered severe emotional distress requiring medical treatment. *Ibid.* Petitioner filed an administrative claim with the United States Postal Service, which was denied. *Ibid.*; see 28 U.S.C. 2675.

Petitioner then filed a complaint against the United States under the FTCA. The government moved to dismiss for lack of subject matter jurisdiction on the ground that petitioner's claim falls within both the

FTCA’s postal exception, 28 U.S.C. 2680(b), and the FTCA’s misrepresentation exception, 28 U.S.C. 2680(h). Pet. App. 13a-15a. The district court granted the government’s motion, holding that the misrepresentation exception bars petitioner’s action. *Id.* at 21a-22a. The court explained that petitioner’s alleged harm was caused by the government’s misrepresentation—that is, that petitioner’s returned envelope stated that petitioner’s son was deceased when he was not. *Id.* at 17a. The court rejected petitioner’s argument that the misrepresentation exception reaches only commercial claims, *id.* at 19a-20a, noting the exception’s broad language, *id.* at 21a.

The district court held that the FTCA’s postal exception did not apply. Pet. App. 16a. The court determined that petitioner’s letter was not lost or miscarried, and that “the ‘deceased’ stamp on the letter is not the kind of ‘damage’ to postal matter that qualifies as ‘negligent transmission’” under *Dolan v. USPS*, 546 U.S. 481 (2006). Pet. App. 16a. Damage is covered by the postal exception, the court stated, if a claim is based “on damage to the contents of an envelope or package,” and not “to markings on the exterior of the envelope.” *Ibid.*

3. The court of appeals affirmed the district court’s dismissal, but did so under the postal exception. Pet. App. 4a-10a. The court concluded that petitioner’s letter had not been lost or negligently transmitted, because the letter “was not returned to [petitioner] ‘in damaged condition.’” *Id.* at 7a (quoting *Dolan*, 546 U.S. at 486). The court held, however, that petitioner’s claim arises out of the letter’s “miscarriage”—that it was an injury “‘arising, directly or consequentially, because mail . . . arrive[d] . . . at the wrong address.’” *Ibid.* (quoting *Dolan*, 546 U.S. at 489) (alterations in original). The

court noted that the Postal Service determined that the “letter [wa]s undeliverable,” returned it to petitioner, and “provide[d] the sender with the reason why it was, or believed it was, unable to deliver the letter.” *Id.* at 8a. The court thus concluded that petitioner’s alleged “distress is the result of a miscarriage—a consequence falling within the postal-matter exception.” *Ibid.*

The court of appeals emphasized that its decision was consistent with “*Dolan*’s observation that the postal-matter exception is limited to harms of ‘the sort primarily identified with the Postal Service’s function of transporting mail throughout the United States.’” Pet. App. 9a (quoting *Dolan*, 546 U.S. at 489). The court explained that while “[t]he injury [petitioner] alleges, belief that the intended recipient has died, may be less typical, * * * it is still another example of the harm that may result when the Postal Service ‘fail[s] in [its] obligation to deliver mail in a timely manner to the right address.’” *Id.* at 8a (quoting *Dolan*, 546 U.S. at 487).

Because the court of appeals held that petitioner’s claim is covered by the postal exception, it did not address the misrepresentation exception. See Pet. App. 9a-10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly applied this Court’s decision in *Dolan v. USPS*, 546 U.S. 481 (2006), and properly concluded that the postal exception bars petitioner’s claim against the United States. In *Dolan*, the Court held that the postal exception did not cover the negligent placement of a package that allegedly

caused the recipient to trip and fall. *Id.* at 483. The Court interpreted the exception to encompass primarily “injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address.” *Id.* at 489. “Such harms,” the Court concluded, “are the sort primarily identified with the Postal Service’s function of transporting mail throughout the United States.” *Ibid.*

As the court of appeals here observed, *Dolan* “interpreted the scope of the [postal] exception in terms of the consequences of negligent acts, rather than in terms of the acts themselves.” Pet. App. 6a. The court of appeals determined that, based on petitioner’s allegations, petitioner’s letter was miscarried because “the letter was properly addressed to her son * * * [but] arrived at the wrong address.” *Id.* at 7a. The court held, consistent with *Dolan*, that petitioner’s alleged injuries arose as a consequence of this miscarriage. *Id.* at 8a. The court observed that “the Postal Service has a duty to deliver letters to their intended recipients. When it concludes, even negligently, that a letter is undeliverable, it returns that letter to the sender. Sometimes, as in this case, it will provide the sender with the reason why it was, or believed it was, unable to deliver the letter.” *Ibid.* The court then correctly determined that petitioner’s letter was returned to her and marked “DECEASED” because the letter had been miscarried, and that petitioner’s alleged harm was “the result of [this] miscarriage.” *Ibid.*

Petitioner does not contest that her letter was miscarried. See Pet. 6. Instead, she argues (Pet. 10) that *Dolan* limits the postal exception to harms sustained to “the things sent through the mails inside of envelopes and boxes.” *Dolan* set forth no such limitation. Rather,

Dolan presented examples of harms suffered as a result of loss, miscarriage, or negligent transmission: “personal or financial harms arising from nondelivery or late delivery of sensitive materials or information (*e.g.*, medicines or a mortgage foreclosure notice).” 546 U.S. at 489. Consistent with *Dolan*, the court of appeals identified other examples of harms from the miscarriage of letters that would be covered by the postal exception: “The letter might be delayed, accidentally opened by someone other than the intended recipient, or never reach its intended destination. As a result, the sender might miss a mortgage payment or experience distress.” Pet. App. 8a. The court recognized that petitioner’s harm in this case was “uncommon,” but held that “[n]othing in *Dolan* suggests that Congress has waived immunity for idiosyncratic harms resulting from consequences ‘delineated’ in 2680(b).” *Id.* at 8a-9a. The court correctly concluded that the miscarriage of petitioner’s letter and her alleged resulting harm were of “the sort primarily identified with the Postal Service’s function of transporting mail throughout the United States,” and that her claim was therefore barred under *Dolan*. *Id.* at 9a (quoting *Dolan*, 546 U.S. at 486).

b. The decision of the court of appeals is consistent with the decisions of other courts of appeals addressing the postal exception. Petitioner’s assertion (Pet. 13) that the court of appeals’ decision conflicts with decisions of the Second and Ninth Circuits is unfounded. Both of those courts addressed whether there had been a “negligent transmission” of mail, not a “miscarriage,” and the reasoning of both decisions is consistent with the court of appeals’ decision here.

In *MB Financial Group, Inc. v. USPS*, 545 F.3d 814, 818-819 (2008) (*MB Financial*), the Ninth Circuit held

that the failure of the Postal Service to make a post office box available to a customer who had paid for the box's use did not constitute a "negligent transmission" of mail under the FTCA's postal exception. The Ninth Circuit interpreted *Dolan* as "distinguishing between the historically governmental service of carrying the United States mail," which is typically covered by the postal exception, "and the performance of acts that may be related to delivery, but constitute more ordinary activities that private actors engage in as well," which are not covered by the exception. *Id.* at 817. The court held that the "alleged negligence was not in transmitting the mail to the proper place of delivery," but instead "was in the admittedly improper handling of [plaintiff's] payment for its post office box." *Id.* at 818. Therefore, the postal exception did not apply. *Ibid.*

The decision below is consistent with *MB Financial*. This case involves the "miscarriage" of mail, not its "negligent transmission." Unlike the sale of post office boxes, the misdelivery of petitioner's letter falls within the "historically governmental service of carrying the United States mail." *MB Financial*, 545 F.3d at 817. Whereas in *MB Financial* "[t]he negligence occurred after the mail was transmitted to the Post Office," *id.* at 818, here the alleged negligence occurred during and in connection with the mail transmission process.

The Second Circuit likewise interpreted the postal exception's "negligent transmission" provision in *Raila v. United States*, 355 F.3d 118 (2004). The Second Circuit held, prior to and consistent with *Dolan*, that "negligent transmission" did not cover the negligent placement of postal material that causes injury to an individual. *Id.* at 119. As discussed above, the court of appeals' decision is entirely consistent with that reasoning. The

court of appeals' decision is also consistent with the Second Circuit's conclusion that the postal exception applies to "damages and delay of the postal material itself and *consequential damages therefrom*." *Id.* at 121 (emphasis added). The court here determined that petitioner's alleged harm was a consequence of the miscarriage of her letter.

Petitioner's assertion (Pet. 13-14) that the court of appeals' decision creates a conflict in the courts of appeals because the court did not limit the postal exception to matters that could be covered by postal insurance is also without merit. The availability of postal insurance to cover some types of losses was only one of the factors that this Court relied on in *Dolan* to interpret "negligent transmission." This Court stated that "losses of the type for which immunity is retained under § 2680(b) are *at least to some degree* avoidable or compensable through postal regulation and insurance." *Dolan*, 546 U.S. at 490 (emphasis added). This statement does not limit the postal exception to losses that are necessarily avoidable or compensable through postal regulation and insurance. While the Ninth Circuit also relied on the availability of postal insurance in interpreting "negligent transmission," that consideration was, again, not dispositive. See *MB Financial*, 545 F.3d at 818.*

* The court of appeals' decision is also consistent with other decisions interpreting the postal exception. See *Levasseur v. USPS*, 543 F.3d 23, 23-24 (1st Cir. 2008) (holding that "theft or concealment of mail—in this case, political campaign flyers that were diverted by a partisan postal employee to prevent them from being delivered to voters shortly before a municipal election—falls within" the postal exception); *Gildor v. USPS*, 179 Fed. Appx. 756, 758-759 (2d Cir. 2006) (holding that plaintiff's "tort claims alleging negligence on the part of the Postal Service in mis-delivering his package" were barred by the postal exception); *Snow v. USPS*, 778 F. Supp. 2d 102, 106-107 (D. Me. 2011)

2. Further review is also unwarranted because the judgment of the court of appeals is supported by alternative grounds. As the district court held, separate and apart from the FTCA's postal exception, petitioner's claim in this case is also barred by the FTCA's misrepresentation exception. Pet. App. 16a-22a. The district court correctly concluded that petitioner's alleged harm here resulted from "the communication of misinformation on which the recipient reli[ed]." *Id.* at 21a (quoting *Block v. Neal*, 460 U.S. 289, 296 (1983)). Dismissal of this case would be warranted not only under the postal exception, but also under the misrepresentation exception. The court of appeals did not address the latter ground, and neither does the petition, but it furnishes an independent reason why the dismissal of petitioner's claim was proper and this case does not warrant review.

(finding that a claim based on the Postal Service's damage to the contents of a package while in transit fell "squarely within the [§] 2680(b) exemption as construed in *Dolan*"); *Naskar v. United States*, 82 Fed. Cl. 319, 322 (2008) (holding the postal exception covered a claim based on an item of mail that was "not delivered to the proper address").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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