No. 04-848

IN THE
Supreme Court of the United States

BARBARA DOLAN,

Petitioner,

v.

UNITED STATES POSTAL SERVICE and the UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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OCTOBER 2005

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REPLY BRIEF FOR THE PETITIONER

In her opening brief, Mrs. Dolan showed that the FTCA's postal matter exception bars any claim arising out of the failure of the Postal Service to fulfill its duty to deliver mail to its intended destination on-time and in good condition, but does not bar any claim arising out of ordinary negligence that happens to occur while the tortfeasor is delivering mail. Mrs. Dolan's construction shields the government from all claims arising out of loss or damage to the mail, while allowing claims that do not stem from violation of a duty unique to the Postal Service. It is the construction most faithful to the statute's text, structure, and purpose. *See Raila v. United States*, 355 F.3d 118 (2d Cir. 2004). To be clear, Mrs. Dolan's construction of the exception bars all claims, whether for personal injury or property damage, that arise when mail is lost, misdelivered, damaged, or delayed.

The government argues for a much broader construction that would bar all claims that arise from the "handling" of mail. The government's construction depends on a definition of "transmission" viewed in isolation from the rest of the statute. The government's response to Mrs. Dolan's construction, which interprets "negligent transmission" in a manner consistent with the language that surrounds it and the purposes of the exception, is based for the most part on a fundamental misunderstanding of Mrs. Dolan's position. The remainder of the government's brief argues unpersuasively that leaving items on a porch is an activity unique to the Postal Service, and the government fails to offer any meaningful response to Mrs. Dolan's review of the extant administrative remedies and pertinent legislative history.

I. The Government's Reliance On Dictionary Definitions And Historical Usage Of The Word "Transmission" Yields An Overbroad Interpretation Of The FTCA's Postal Exception.

Mrs. Dolan acknowledged in her opening brief that, if considered in isolation, the phrase "negligent transmission" in 28 U.S.C. § 2680(b) could be read to bar every claim for negligence where the tortfeasor was handling mail, but explained that such an interpretation cannot be reconciled with the text, structure, purpose, and history of the exception and the FTCA as a whole. Pet. Br. 3. Thus, the government's focus on a dictionary definition of "transmission" misses the mark. *See* Gov't Br. 11-13. There is no dispute that dictionary definitions of "transmission" can encompass "delivery" in the broadest sense, but that unremarkable fact provides no help in interpreting "negligent transmission" within the context of § 2680(b). Indeed, the government concedes that "transmission" is such a common term that it has no single meaning even in the context of federal postal statutes (Gov't Br. 15), and none of the government's list of historical uses of "transmission" involve the phrase "negligent transmission."

Section 2680(b) excuses the government from liability for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." For the phrase "negligent transmission" to be consistent with "loss" and "miscarriage," it must refer to acts or omissions that constitute a breach of the government's duty to get mail to its intended destination on-time and in good condition, as opposed to all acts or omissions that occur while mail is being delivered. Thus, Mrs. Dolan argued in her opening brief that under the canon of *noscitur a sociis*, "negligent transmission" must refer to carelessness during delivery that causes the *mail* to be

delayed or damaged (Pet. Br. 4), a point to which the government does not respond.

The government also ignores Mrs. Dolan's observation that if Congress had intended § 2680(b) to have the sweeping breadth urged by the government, it could have explicitly excepted from FTCA coverage any claim "arising from the activities of" the Postal Service or "in respect of" the delivery of mail. Pet. Br. 5 & 9 (comparing text of § 2680(b) with that of 2680(*l*), (m), and (c)). That it did not do so indicates that Congress intended a more narrow construction.

II. Much Of The Government's Brief Is Inapposite Because Mrs. Dolan Does Not Propose The Distinction Between Claims For Personal Injury And Property Damage That The Government Attributes to Her.

The government fundamentally misconstrues Mrs. Dolan's position. The government asserts that Mrs. Dolan would interpret § 2680(b) to except from liability only claims for property damage that arise from the negligent transmission of mail. Gov't Br. 18. The government is wrong. The parties' dispute is not about the nature of the resulting harm, but the nature of the *acts and omissions* that constitute "negligent transmission."

Mrs. Dolan argued in her opening brief that, by excepting from the FTCA all claims arising from the "negligent transmission" of mail, § 2680(b) shields the government from liability for any harm (whether to persons or property) that results when mail is damaged or delayed by negligence, but § 2680(b) provides no protection from claims for any harm (whether to persons or property) caused by negligence that does not affect the mail. The government fails to grasp this point.

As a result, much of the government's brief is inapposite—it addresses an argument that Mrs. Dolan does not make.

To be clear, Mrs. Dolan agrees that claims for personal injuries that arise from the "loss, miscarriage, or negligent transmission" of mail are barred by § 2680(b). The issue on which the parties disagree is whether Mrs. Dolan's personal injuries arise out of the "negligent transmission" of mail as that phrase is used in § 2680(b).

Mrs. Dolan did not suffer an injury because mail was lost, delivered to the wrong address, or damaged or delayed by negligence. Rather, Mrs. Dolan was injured in a slip-and-fall caused by the careless placement of "letters, packages and periodicals" on her porch. Pet. App. 15a. Section 2680(b) is not implicated just because it was a letter carrier's carelessness that created the hazard that resulted in Mrs. Dolan's injury. Section 2680(b) would bar Mrs. Dolan's claim only if she had been injured as a result of a failure by the Postal Service to carry out its unique duty to deliver mail to its intended destination on-time and in good condition.

For example, if Mrs. Dolan had suffered a personal injury because her medication was lost in the mail, or because dangerous articles were carried to her address instead of to the intended recipient, Mrs. Dolan's claim would be barred. Similarly, if Mrs. Dolan had been injured by the broken contents of a package damaged by negligence during delivery, or by eating food that had spoiled because the package was delayed by negligence during delivery, Mrs. Dolan's claim would be barred. In this case, however, the claim does not arise out of the Postal Service's failure to perform its unique governmental duty. The mail was not lost, delivered to the wrong address, or damaged or delayed through negligence. Thus, the government's immunity from "[a]ny claim arising out

of the loss, miscarriage, or negligent transmission of letters or postal matter" does not apply.

III. The Construction Of "Negligent Transmission" Urged By Mrs. Dolan Is Consistent With Its Historical Use.

The government has exhaustively surveyed various uses of the word "transmission" in cases and statutes, but none of the sources cited in the government's brief use the two-word phrase "negligent transmission." As explained in Mrs. Dolan's opening brief, at the time the FTCA was drafted, the phrase "negligent transmission" had an established definition as a tort in the telegraph context. Pet. Br. 6-7. The meaning of the term "negligent transmission" at common law is thus relevant to determine the meaning of the same phrase in § 2680(b). "Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.'" *Molzoff v. United States*, 502 U.S. 301, 307-08 (1992) (quoting *United States v. Neustadt*, 366 U.S. 696, 707 (1961)).[1]

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[1]The government argues that Mrs. Dolan cites too few cases to establish that the term "negligent transmission" had a widely accepted common-law meaning at the time the FTCA was enacted. Gov't Br. 25. Even a cursory survey of the reported cases and secondary sources, however, reveals that the tort for "negligent transmission" of telegrams was well-established. The tort is recognized in both the leading hornbook on tort law, *see* William L. Prosser, *Law of Torts* § 54, 329 (4th ed. 1971) (recognizing tort "against a telegraph company for the negligent transmission of a message"), and in one of the leading histories of the development of American common law, *see* Thomas Atkins Street, *Negligent Transmission of Telegrams* in 1 *The Foundations of Legal Liability* (1906) at 435-56. Indeed, the cases are legion. *See*, *e.g.*, *McNally Pittsburg Mfg. Corp. v. W. Union Tel. Co.*, 353

In the telegraph context, "negligent transmission" referred to carelessness that breached the telegraph company's duty to accurately and timely transmit a message to its intended recipient. This use of "negligent transmission" is consistent with use of the same phrase in § 2680(b) to refer to carelessness

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P.2d 199 (Kan. 1960) (action against telegraph company for damages resulting from negligent transmission of an intrastate telegraphic business message); *Kaufman v. W. Union Tel. Co.*, 224 F.2d 723 (5th Cir. 1955) (action for negligent transmission of telegram falsely represented to be a death message); *W. Union Tel. Co. v. Bowen-Oglesby Milling Co.*, 2 S.W.2d 23 (Ark. 1928) (affirming award of damages to telegram recipient who sold goods at the wrong price because of "the negligent transmission of the telegram"); *Friedlander v. Postal-Tel. Cable Co.*, 271 F. 954 (N.D. Ohio 1921) (describing telegraph company's "usual"defense that it has contracted to limit liability "for damages due to negligence in transmitting" messages and observing that "it is settled law in the United States courts" that such waivers are valid absent statute to the contrary); *Brewer v. Postal Tel. Cable Co.*, 223 S.W. 949 (Mo. App. 1920) (action "against the defendant telegraph company for damages arising out of the negligent transmission of a telegram"); *Weld v. Postal Tel.-Cable Co.*, 103 N.E. 957, 961 (N.Y. 1910) (action for recovery of "damages sustained by the plaintiffs through the alleged negligence of [telegraph company] in transmitting a telegraphic message"); *Abraham v. W. Union Tel. Co.*, 23 F. 315 (C.C.D. Or. 1885); *White v. W. Union Tel.*, 14 F. 710 (C.C.D. Kan. 1882). As Prosser explains, a "respectable minority of courts" allowed recovery not only for economic damages, but also for mental distress caused by the failure of a message to reach its destination as intended. Prosser, *Law of Torts*, at 329 (citing *So Relle v. W. Union Tel. Co.*, 55 Tex. 308 (1881); *Mentzer v. W. Union Tel. Co.*, 62 N.W. 1 (Iowa 1895); *Russ v. W. Union Tel. Co.*, 23 S.E.2d 681 (N.C. 1943); *W. Union Tel. Co. v. Redding*, 129 So. 743 (Fla. 1930); *W. Union Tel. Co. v. Crumpton*, 36 So. 517 (Ala. 1903)). In addition, in several states, the tort was also recognized under state statutes that codified and refined the common law. *W. Union Tel. Co. v. Taylor*, 114 So. 529, 531 (Fla. 1927) (discussing state statute providing that telegraph companies were, "as at common law, liable for such damages as naturally and proximately flow or result from their negligent failure to transmit and deliver any message placed in their hands for transmission").

that breaches the government's duty to transmit mail to its intended recipient on-time and in good condition. Section 2680(b) bars claims for negligent transmission of mail, just as it bars claims for lost and miscarried mail, because Congress wanted to shield the government from liability for delivery errors that cause the mail to be damaged or delayed.

The tort of "negligent transmission" developed to hold telegraph companies liable for "breach of a public duty" to ensure that telegrams arrived at their destinations as intended, a duty that extended both to the sender and the recipient. Street, *Negligent Transmission of Telegrams*, at 435; *see id.* at 439 ("[E]ven leaving out of consideration certain statutory enactments which in a few states have imposed such a duty, the common law itself imposes a duty on the telegraph company to use due care."). That "duty on the part of the company to take care in transmitting messages [was] found in the status of telegraph companies and the nature of their business." *Id.* at 440. As explained in *Mentzer*, 62 N.W. at 3, a telegraph company "is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties . . . . It owes a duty to all whom it attempts to serve, independent of the contractual [relationship] entered into when it receives its messages." Similarly, the Postal Service has a public duty to transmit each article of mail to its intended recipient on-time and in good condition. By importing the common-law term "negligent transmission" into section 2680(b), Congress signaled its intent to shield the government from liability arising out of the breach that duty, while allowing claims against the government for failure to exercise a general duty of care that it has in common with any private person.

The government argues that "negligent transmission" at common law referred to "negligence in the manner of the telegram's delivery to the recipient" (Gov't Br. 25), but that

statement is true only to the extent that the manner of delivery affected the telegraph company's ability to fulfill its duty to communicate the message as intended. The government does not suggest that any claim arising from injury to a person or property caused by ordinary negligence would have given rise to a claim for "negligent transmission" just because the tortfeasor happened to be delivering a telegram when the hazard was created. Mrs. Dolan agrees with the government that "tort liability for the negligent transmission of telegrams did include claims for injury to persons" (Gov't Br. 25), but personal injuries resulted from "negligent transmission" only where they were precipitated by carelessness that disrupted the accurate and timely conveyance of the message.

IV. The Government Errs By Focusing On Whether Mail Is Being Handled When The Negligence Occurs, Rather Than Whether The Duty Breached Is Unique To The Postal Service.

The government reluctantly concedes that the bar on claims arising out of the negligent transmission of mail does not bar claims arising from a postal employee's negligent operation of a motor vehicle, even while engaged in the delivery of mail. Gov't Br. 27, 29. In an attempt to reconcile that concession with its broad construction of § 2680(b), the government argues that the exception preserves sovereign immunity only for "claims that arise directly from negligence in the unique postal function of handling and delivering the mail." Gov't Br. 28. The government's focus on whether mail is being "handled" at the time the negligence occurs, rather than whether the duty breached is unique to the postal service, finds no support in the text, structure, or purpose of the statute, and is unworkable in practice.

As an initial matter, the government errs in claiming that the activity that gave rise to Mrs. Dolan's injury "is unique to the Postal Service." *Id.* at 32. Leaving items on a porch is a common activity engaged in by all manner of tradespeople, delivery services, and individuals trying to convey items or literature to a private home. Mrs. Dolan was injured by a hazardous condition that could just as easily have been created by a newspaper carrier, a neighbor returning a borrowed item, or a vendor delivering a product, as by a letter carrier delivering mail. Just as operating a motor vehicle is not a unique governmental function simply because the vehicle is carrying mail, leaving items on a porch is not a unique governmental function simply because the item delivered is mail. Thus, even under the government's construction, Mrs. Dolan's claim would not be barred.

More importantly, Mrs. Dolan's claim is not barred by § 2680(b) because her injuries resulted from the breach of a general duty of care that is common to both the government and private parties. Government employees and private parties alike have a duty not to create a hazardous condition when leaving items on a porch. In contrast, only the Postal Service has a duty to ensure that mail reaches its intended destination on-time and in good condition, and it is claims that arise from a breach of that duty that are barred by § 2680(b).

Having conceded that § 2680(b) does not bar all claims arising from postal vehicle accidents because driving is not an activity unique to the Postal Service, the government's construction of the exception requires it to make tenuous and tortured distinctions. Indeed, the government's construction is both overinclusive and underinclusive, because it seems to allow claims for the destruction of mail caused by the negligent operation of a motor vehicle, while barring claims for injuries

caused by a motor vehicle if the accident occurred while the vehicle operator was handling mail.[2]

For example, in the government's view, an accident in which a postal employee driving a mail truck hits a mail recipient's car "in the process of handing off the mail" would present "a close question as to the exception's applicability." Gov't Br. 30 n.9. Presumably, in the government's view, the identical accident would not present such a "close question" if the tortfeasor happened not to be handling mail at the time of the accident. But any rule that would distinguish between the two accidents makes little sense. The duty breached in both cases is the ordinary duty to observe care in the operation of a motor vehicle—it does not matter whether the driver happens to have mail in hand when the collision occurs.

The government's theory also requires it to take the extreme position that § 2680(b) bars "tort claims brought by individuals struck by mail pouches thrown from moving trains," *id.,* even though such claims were brought successfully in the decade following the FTCA's enactment. *See* Pet. Br. 7. The government dismisses those cases as "turn[ing] upon different preliminary questions concerning the litigation of indemnification claims under the FTCA," (Gov't Br. 30 n.9), but that response is misleading. For example, in *Chicago, Rock Island & Pacific Railway Co. v. United States*, 220 F.2d 939 (7th Cir. 1955), the court addressed the threshold question of

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[2]Although the government denies that claims could be brought for mail damaged as the result of a motor vehicle accident (Gov't Br. 30 n.9), the government never explains how that result would flow from a construction of the exception that bars only those claims that arise from direct handling of the mail. In contrast, Mrs. Dolan's construction is clear—the exception bars any claim arising out of a breach of the government's duty to deliver mail to its intended recipient on-time and in good condition.

whether the United States could be sued for indemnification under the FTCA, but went on to address and reject the government's affirmative defense that the suit was barred by the FTCA's statute of limitations. *Id.* at 942. The government *could* have asserted the additional affirmative defense that the claim was barred by § 2680(b) if it had thought the exception applicable, but it did not, and a judgment against the United States was left standing. Indeed, the government has asserted the exception in other cases involving third-party indemnification claims under the FTCA. *See*, *e.g.*, *Marine Ins. Co. v. United States*, 378 F.2d 812 (2d Cir. 1967).

V. The Legislative Purposes Of The FTCA And Its Exceptions Support Mrs. Dolan's Construction Of The Statute, And The Government Offers No Persuasive Response.

The government addresses several of Mrs. Dolan's arguments only in the last three pages of its brief. *See* Gov't Br. 39-41. The opening brief explained that the most sensible reading of § 2680(b) is one that is consistent with Congress's intent to exclude from the FTCA claims for which adequate remedies were already available at the time the statute was enacted, such as claims arising from lost or damaged mail. Pet. Br. 11-13; *see Kosak v. United States*, 465 U.S. 848, 858 (1984) (describing Congress's objective of "not extending the coverage of the Act to suits for which adequate remedies were already available"). In particular, Mrs. Dolan noted that this Court, only seven years before the passage of the FTCA, recognized that the postal laws and regulations in place at the time provided "a fairly complete administrative formula" for handling claims arising out of loss or damage to the mail, and that "Congress intended that [such] claims . . . would be handled through the government rather than through various suits by individuals." *United States ex rel. Midland Loan Fin. Co. v. Nat'l Sur. Corp.*,

309 U.S. 165 (1940); *see* Pet. Br. 11-12 (citing pre-1946 postal laws and regulations). Tellingly, the government does not challenge any of this discussion of the administrative remedies available to postal customers prior to 1946.

The opening brief also showed that the FTCA's legislative history confirms that Congress intended that § 2680(b) would exclude claims for loss or damage to the mail because adequate protection was available through postal insurance and registration. Pet. Br. 15-19. The government offers no specific challenge to Mrs. Dolan's conclusion. Gov't Br. 41. Instead, the government provides three general responses.

First, the government objects to Mrs. Dolan's supposed "insistence" that "Congress was entirely unconcerned with the effect of tort liability on the uniquely sovereign and vital function of providing universal mail service" and her supposed contention "that the sole purpose of the postal exception was to withdraw from the FTCA's coverage claims already addressed by the existing programs for registered and insured mail." Gov't Br. 39. The short answer to this point is that it responds to arguments of the government's own invention. In fact, the opening brief stressed that the postal exception should be interpreted in light of the "core function of the USPS" to "deliver large quantities of mail at low cost," and it discussed all three of the general purposes for the FTCA's exceptions identified in *Kosak*. *See* Pet. Br. 9-13. A key purpose of § 2680(b) is to protect the government's ability to fulfill its unique public obligation to provide high-volume, universal, and low-cost mail service by preserving governmental immunity for claims that arise when mail is lost, misdelivered, damaged, or delayed. Mrs. Dolan's opening brief explained that this vital government function is not threatened by allowing tort claims against the USPS for negligence that does not arise out of a

failure to meet that obligation. *Id.* 9-11. Mrs. Dolan's construction of the exception is also consistent with Congress's purpose of avoiding exposure to liability for excessive or fraudulent claims.[3]

Second, the government accuses Mrs. Dolan of "ignor[ing] the fact" that, prior to the FTCA's enactment, the Postal Service had "authority to settle personal injury claims for $500 or less" (Gov't Br. 40 (citing 31 U.S.C. § 224c (1940))), thus allowing the government to suggest that personal-injury liability under the FTCA would have been superfluous. Again, the government is simply incorrect. Far from ignoring it, the opening brief specifically discussed this limited discretionary remedy and explained that the remedy was *repealed and*

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[3]The government suggests that allowing liability for personal injury claims that arise while the tortfeasor is delivering mail will create a significant potential for fraud and lead to an "inundation" of slip-and-fall cases. Gov't Br. 36-38. But in the sixty years since the FTCA's enactment, even though no court of appeals had adopted the government's broad construction of § 2680(b) until last year, there have been very few reported cases involving such accidents. Notably, the Postal Service's own handbook for investigating tort claims lists "[p]ersonal injury or damage to [the] customer's property during the delivery operation" as among the types of "accidents resulting in tort claims," but does not list such claims under the immediately following section concerning "Claims Excluded Under the Federal Tort Claims Act." USPS, *Accident Investigation - Tort Claims, Handbook,* PO-702 § 141 (June 1992) at 7. USPS management instructions promulgated only two years earlier had referred only to "[d]amage to customer's property during the delivery operation," USPS, *Management Instruction, Accident Investigation Tort Claim Activities*, PO-730-90-01 (Jan. 8, 1990). This suggests that, at least since 1992, even the Postal Service anticipated that personal injury claims would arise out of the delivery of mail and that such claims would not be excluded from the FTCA. *See also Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. at 11 (1940) (discussing procedures to safeguard the government from fraudulent FTCA claims).

replaced by the FTCA. Pet. Br. 13 (citing Legislative Reorganization Act of 1946, ch. 753 § 424(a), 60 Stat. 812, 846-47 (1946)). Thus, that remedy could hardly have been a reason to exclude claims such as those raised by Mrs. Dolan. The government states that "similar authority continues today," (Gov't Br. (citing 39 U.S.C. § 2603)), but that statement is also incorrect.[4]

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[4]To be clear, the government had the authority prior to 1946 to settle claims arising out of "any damage . . . to person or property by or through the operation of the Post Office Department" and that authority "extend[ed] to cases *caused by the negligence of any officer or employee* of the Post Office Department or Postal Service acting within the scope of his employment." 31 U.S.C. § 224c (1940) (emphasis added). However, when the FTCA was enacted in 1946, Congress repealed "[a]ll provisions of law" that authorized federal agencies to settle "on account of damage to or loss of property, or on account of personal injury or death, *caused by the negligent or wrongful act or omission of any employee* of the Government while acting within the scope of his office or employment." Legislative Reorganization Act of 1946, ch. 753, § 424(a), 60 Stat. 812, 846 (1946) (emphasis added). In addition to this blanket repeal, Congress specifically listed 31 U.S.C. § 224c as among those statutes affected by the repeal. *Id.* at 847. The same legislation also made clear that "nothing herein shall be deemed to repeal any provision of law authorizing" an agency to settle a claim in which the injury "was not caused by any negligent or wrongful act or omission of an employee." *Id.* Thus, § 224c remained in effect after 1946, but *only as to claims that did not involve negligence*. In later versions of the statute, Congress omitted the original language that extended settlement authority to negligence cases, making clear that the remedy did not extend to such claims. *See* 39 U.S.C. § 2409 (Supp. II 1960) ("When the Postmaster General finds a claim for damage to persons or property resulting from the operation of the Department to be a proper charge against the United States, and it is not cognizable under section 2672 of title 28, he may adjust and settle it in an amount not exceeding $500."); 39 U.S.C. § 2603 (1970); *see also* S. Rep. No. 86-1763 (1960), at A24 (explaining, as part of the revision notes to 1960 recodification of Title 39, that "[r]eference to negligence is omitted, since the Federal Tort Claims Act repealed that portion of section 224c").

Third, the government suggests that postal insurance and registration could not have been regarded as providing an adequate remedy for claims arising out of damage or delay of mail because those protections generally extended only to the sender rather than the recipient of mail. Gov't Br. 40-41. That fact alone does not render the protections inadequate. Indeed, it is often the sender who purchases insurance or registration to protect against claims by the recipient that the mail arrived damaged or not at all. Senders and recipients will generally resolve any disparities in relief available for lost or damaged mail through the private contractual relationships between those parties, such as a shipping agreement between two merchants or a sales agreement between a vendor and a mail-order purchaser or through uniform commercial laws governing the sales of goods. Moreover, the legislative history confirms that the postal exception was meant to exclude claims for the loss or delay of mail because those claims were adequately addressed by the existing regulations. *See Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. at 38 (1940) (Statement of Alexander Holtzoff) (expressly referring to the relationship between § 2680(b) and the availability of postal registration and stating that "[i]t would be intolerable, of course, if in any case of loss or delay the Government could be sued for damages. Consequently, this provision was inserted."). Finally, to the extent that the *current* Postal Service procedures afford limited or no protection for particular articles, such as laser disks or CAT scan images, those features of the current system are irrelevant to determining what Congress intended in 1946. *See* Gov't Br. 41.

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Mrs. Dolan was injured by a hazardous condition that resulted from the breach of a general duty of care by a

government employee who happened to be delivering mail. Thus, Mrs. Dolan's claim is not barred as "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," because § 2680(b) bars lawsuits for harm that results from a breach of the Postal Service's unique duty to deliver the mail to its intended destination on-time and in good condition. Contrary to the government's assertions, the postal matter exception is not so broad that it shields the government from all claims for ordinary negligence just because the tortfeasor was handling mail.

CONCLUSION

The decision below should be reversed and the case remanded for proceedings on the merits of Mrs. Dolan's claim.

Respectfully Submitted,

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October 2005