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IN THE SUPREME COURT OF THE UNITED STATES

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BARBARA DOLAN, :

Petitioner, :

v. : No. 04-848

UNITED STATES POSTAL SERVICE, :

ET AL. :

- - - - - x

Washington, D.C.

Monday, November 7, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JAMES R. RADMORE, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioner.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
JAMES R. RADMORE, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
PATRICIA A. MILLETT, ESQ.	
On behalf of the Respondents	22
REBUTTAL ARGUMENT OF	
JAMES R. RADMORE, ESQ.	
On behalf of the Petitioner	55

1 damage, that arise while the mail is -- if the mail is
2 lost, misdelivered, damaged, or delayed.

3 The Government argues for a much broader
4 construction that would bar all claims that arise from the
5 handling of mail. The Government's construction depends
6 on a definition of transmission of the mail, viewed in
7 isolation from the rest --

8 JUSTICE O'CONNOR: Mr. Radmore, what was the
9 purpose of the enactment of the waiver of Federal
10 sovereign immunity here? Was it to allow recovery for
11 auto accidents occurring by postal trucks?

12 MR. RADMORE: Well, the --

13 JUSTICE O'CONNOR: Was that basically the
14 purpose?

15 MR. RADMORE: Justice O'Connor, this Court's
16 decision in Kosak tells us that one of the main purposes
17 in enacting the Federal Tort Claims Act was to allow
18 private persons to be able to make claims against the
19 Postal Service from motor vehicle --

20 JUSTICE O'CONNOR: Arising --

21 MR. RADMORE: -- accidents.

22 JUSTICE O'CONNOR: -- out of auto accidents.

23 MR. RADMORE: Correct.

24 JUSTICE O'CONNOR: And do we normally construe
25 waivers of sovereign immunity narrowly?

1 MR. RADMORE: Well, once you --

2 JUSTICE O'CONNOR: I thought we did.

3 MR. RADMORE: But once there's a broad waiver --

4 JUSTICE O'CONNOR: For auto accidents.

5 MR. RADMORE: Well --

6 JUSTICE O'CONNOR: Now, why should we interpret
7 the exception broadly?

8 MR. RADMORE: Well, the exception -- this Court
9 has told us, in both Smith and Kosak, that it is the --
10 the lower courts and this Court, when they're viewing an
11 exception to the Federal Tort Claims Act -- that they
12 shouldn't extend the waiver, nor should they view it more
13 narrowly, that they should look at the waiver -- they
14 should look at the exception and make a determination as
15 to what the meaning of the words are, and what the reason
16 for the exception was, and they should do no more, nor no
17 less, than that.

18 JUSTICE SCALIA: Well, I guess we've already
19 construed it broadly, haven't we, in -- or, excuse me --
20 yes, construed the waiver broadly. In Kosak versus United
21 States, we allowed a suit against the United States for
22 negligence of a mail truck in an automobile accident. I
23 suppose the language could have covered that, couldn't it?

24 MR. RADMORE: Well, that's exactly what the
25 point -- that our point is, is that, because the

1 Government, in this case in -- and the Court, in Kosak,
2 has told us that automobile accidents are not barred, are
3 -- from -- by -- they're not barred --

4 JUSTICE SCALIA: It could --

5 MR. RADMORE: -- in the case --

6 JUSTICE SCALIA: -- have been within the
7 literal. It could have been negligent -- what is it? --
8 negligence --

9 MR. RADMORE: Negligent --

10 JUSTICE SCALIA: -- in the delivery of mail?

11 JUSTICE GINSBURG: Negligent --

12 MR. RADMORE: Negligent --

13 JUSTICE GINSBURG: -- transmission.

14 MR. RADMORE: -- transmission.

15 JUSTICE SCALIA: Yes.

16 JUSTICE GINSBURG: But an automobile accident is
17 something, as the Government points out, that any agency
18 of Government can be involved in, not peculiar to the
19 Postal Service. But the transmission of the letter is --
20 the words are "negligent transmission." Many people think
21 of the Postal Service, the letter carrier, delivering the
22 mail to one's home. That act surely fits the word
23 "negligent transmission."

24 MR. RADMORE: Justice Ginsburg, in isolation, we
25 admit that the word "transmission" could have the broad

1 interpretation that the Government as -- is urging this
2 Court to follow. But you have to look at the term
3 "negligent transmission" in the context of the whole
4 exception. And if "negligent transmission" were to be
5 given the broad interpretation that the Government urges
6 and the Third Circuit found, then the words "loss" and
7 "miscarriage" in the exception would be superfluous. And
8 we also know that this Court, on prior occasions, has
9 indicated that the canon that "words are known by their
10 associate" applies in construing exceptions to the Federal
11 Tort Claims Act. And in -- that canon tells us that when
12 you have words that are in a group, they should be given
13 like meaning. And we know that only mail can be lost,
14 only mail can be delivered to the wrong location. And, as
15 a result, it's pretty clear that the term "negligent
16 transmission" deals with the mail, itself. And --

17 CHIEF JUSTICE ROBERTS: How -- wait, I -- it's
18 not true that only mail can be lost, or only mail can be
19 delivered to the wrong location. If you order from a
20 private delivery service, they can do all of those things,
21 as well.

22 MR. RADMORE: Well, they can do all those
23 things, but they don't have the benefit of the -- of
24 sovereign immunity.

25 CHIEF JUSTICE ROBERTS: What do you consider

1 covered by negligent transmission? I take it if the -- if
2 the postal worker throws the package to the house and
3 there's something in it that gets broken, that's covered
4 by the exception?

5 MR. RADMORE: Any damage to the mail, itself,
6 would be covered to the exception -- by the exception.
7 For instance, if a -- if somebody had ordered their
8 medication over the -- you know, through the Medicare Act,
9 and they had ordered it from a warehouse somewhere in
10 Idaho, and the -- during the transmission of the mail, the
11 medication had been lost, well, if somebody was injured,
12 if they had a stroke or they had a heart attack because
13 they didn't get their mail on time --

14 CHIEF JUSTICE ROBERTS: Right. But if -- now,
15 if they throw the package onto the porch, and it lands in
16 a place where somebody's going to trip over it, you say
17 that's not covered by the exception.

18 MR. RADMORE: That's not covered, because that's
19 an act of ordinary negligence. Damage to the package
20 would always be covered, but the act of creating a
21 hazardous condition would not be covered, because that's
22 an ordinary tort that would be -- subject private persons
23 to a liability between themselves. And that's -- the
24 purpose of the Federal Tort Claims Act is to allow the
25 Government to be held responsible for ordinary torts if

1 there would be a like liability between private persons.

2 JUSTICE STEVENS: Wouldn't the term "negligent
3 transmission" probably cover late deliveries?

4 MR. RADMORE: It would cover late deliveries.

5 JUSTICE STEVENS: Or incorrect deliveries in --

6 MR. RADMORE: It would -- could.

7 JUSTICE STEVENS: -- to the wrong address,
8 something like that.

9 MR. RADMORE: Delay or damage --

10 JUSTICE STEVENS: Yes.

11 MR. RADMORE: -- to the --

12 JUSTICE SCALIA: It could cover, under your
13 theory, this very act, just dumping the stuff there on the
14 porch, if the consequence of that had not been that the
15 homeowner tripped over it, but that rain destroyed the
16 contents of the -- of the letters so that they were
17 illegible.

18 MR. RADMORE: That's correct.

19 JUSTICE SCALIA: You would --

20 MR. RADMORE: I --

21 JUSTICE SCALIA: -- say that that would --

22 MR. RADMORE: Justice --

23 JUSTICE SCALIA: -- be covered.

24 MR. RADMORE: -- Scalia, that's correct, that
25 the exception would bar suit against the Government for

1 any damage to the actual contents of the package, itself.

2 JUSTICE SCALIA: So, in -- it seems to me a
3 little strange that this same act is both within the
4 exception and not within the exception, the same act of
5 negligence.

6 MR. RADMORE: Well, it's not really the same
7 act. It's the same act, in that they used the mail, and
8 there was a consequence to the mail, but the creation of a
9 hazard or -- through some kind of careless act, whether it
10 be the postal employee or whether it be a person that
11 would raise 2680(c) from the customs exception, whether --
12 or an IRS agent or a private person --

13 JUSTICE STEVENS: But it --

14 MR. RADMORE: -- would all be responsible for
15 creating a hazardous condition on the porch.

16 JUSTICE STEVENS: But isn't your response to
17 Justice Scalia -- you could make the same argument. If
18 there's an accident, and the truck caught on fire, and the
19 mail was destroyed, you couldn't recover for the lost mail
20 in the truck, but you could -- but you could recover for
21 personal injury resulting from the accident. It would be
22 precisely the same conduct.

23 MR. RADMORE: Precisely the same under our
24 interpretation of --

25 JUSTICE SCALIA: That is a good answer. I'm

1 glad you came up with that.

2 [Laughter.]

3 CHIEF JUSTICE ROBERTS: What does "negligent
4 transmission" add to "loss" or "miscarriage"?

5 MR. RADMORE: Well, the -- "loss" doesn't cover
6 mail that would be delayed or damaged.

7 CHIEF JUSTICE ROBERTS: But I supposed
8 "miscarriage" does.

9 MR. RADMORE: "Miscarriage" would be mail that
10 went to the wrong location. If it was misdelivered,
11 that's what "miscarriage" would mean in this context.

12 CHIEF JUSTICE ROBERTS: Or mis-carried, like
13 handled in a way that it's damaged, or put in a place
14 where it's going to be damaged. It seems to me that --
15 I'm not sure what additional weight "negligent
16 transmission" covers if you have a reasonable reading of
17 "miscarriage."

18 MR. RADMORE: Well, you could look at every term
19 in the exception, and, if you gave it the broadest
20 definition possible, you could say that all of the words
21 are superfluous, that "loss" would cover mail that was,
22 you know, lost and not delivered to the postal patron
23 within two weeks, and, for that period of time, the mail
24 was lost. But if you look at the exception in --

25 CHIEF JUSTICE ROBERTS: No, that doesn't work.

1 I mean, if you deliver it to the house next door, you
2 haven't lost it, you've misdelivered it or miscarried it.
3 I don't -- I don't think "miscarriage" is redundant. But
4 you -- your construction of "negligent transmission" is so
5 narrow that I'm not sure it adds anything to
6 "miscarriage," which suggests it might --

7 MR. RADMORE: Well, "miscarriage" doesn't mean
8 that the mail was damaged. "Miscarriage," if I take the
9 -- if the mail is delivered, Mr. Justice Roberts, to your
10 next-door neighbor, it doesn't mean the mail is -- maybe
11 miscarried, but it's not delayed, and it's not damaged.
12 So --

13 CHIEF JUSTICE ROBERTS: What about "delay"?
14 Does "delay" -- your -- isn't that something that's
15 neither within "loss" or "miscarriage"?

16 MR. RADMORE: No, "delayed" wouldn't be within
17 either term. "Lost," I think, means exactly what it says,
18 mail that's lost. "Lost" means lost.

19 JUSTICE SCALIA: Right.

20 JUSTICE BREYER: So, if, in fact, they -- the
21 Post Office negligently delays the knowledge that would
22 come to me in the letter, that I have 15 days to claim my
23 billion-dollar inheritance --

24 [Laughter.]

25 JUSTICE BREYER: -- I guess I couldn't sue.

1 MR. RADMORE: You couldn't sue.

2 JUSTICE BREYER: All right. Well, suppose what
3 they do is -- this is -- it seems to me this case is like
4 a first-year law school hypothetical. But, I mean, the --
5 suppose that the -- what they do is, he puts the mail on
6 the porch, my package, and he rips it open, negligently;
7 and there for everyone to see is the toupee that I
8 ordered.

9 [Laughter.]

10 JUSTICE BREYER: And I sue -- I sue for public
11 humiliation. See? I mean, what about that one?

12 [Laughter.]

13 MR. RADMORE: I have that same problem.

14 [Laughter.]

15 MR. RADMORE: It --

16 JUSTICE BREYER: I mean, what I -- to sort of my
17 cards on the -- I was thinking, "Well, that comes close,"
18 but maybe it -- maybe it is within the -- within the --
19 within the exception. I'm not sure. And then --

20 JUSTICE SCALIA: I think --

21 JUSTICE BREYER: -- I think --

22 JUSTICE SCALIA: -- I think you're covered.

23 JUSTICE BREYER: -- on the other --

24 JUSTICE SCALIA: I think that's negligence
25 transmission.

1 JUSTICE BREYER: On the other -- no, they --
2 see, it -- he put it on the porch, which is transmitting
3 it, in such a way that it fell open. But I'm just trying
4 to think -- and then the -- on the other side of it, you
5 have the automobile accident. And I guess he comes along
6 the street, the postman, swinging my package around, and
7 bops someone on the head with it. I guess that's covered.
8 And then, this case is somewhere in the middle.

9 MR. RADMORE: Well, obviously, a line has to be
10 drawn somewhere.

11 JUSTICE BREYER: But what's the principle
12 according to which we're drawing it?

13 MR. RADMORE: Well, I think anything -- any
14 claim that would arise from the unique governmental duty
15 to deliver the mail on time and in good condition would be
16 barred. Any --

17 JUSTICE SCALIA: Excuse me --

18 JUSTICE BREYER: But the --

19 JUSTICE SCALIA: -- I don't understand your last
20 -- your last answer. You think bopping somebody on the
21 head in the course of delivering a package would --

22 MR. RADMORE: Oh, no, it wouldn't be barred,
23 because that's an ordinary tort.

24 JUSTICE SCALIA: Okay.

25 MR. RADMORE: But the mail -- in that

1 hypothetical, the mail still arrived on time and in good
2 condition if they bopped somebody on the head. There
3 wouldn't be a bar --

4 JUSTICE BREYER: Well, ordinary tort doesn't
5 quite work, because I guess my public humiliation case is
6 -- could be an ordinary tort. Somebody could go up to the
7 porch and rip it open, nothing to do with the mail. And,
8 moreover, somebody could, in fact, delay the transmission
9 of my inheritance. See? They could. So, all those
10 things could be ordinary torts.

11 MR. RADMORE: But they don't have a duty. The
12 difference is, in that case, if a -- if a private person
13 were to go and open up the package, or if a private person
14 were to take your letter that showed that you had an
15 inheritance, a private person doesn't have the duty. Only
16 the Government has a duty to deliver the mail on time and
17 in good condition.

18 JUSTICE BREYER: Doesn't it have a -- in good
19 condition. Therefore, when they put it -- therefore, I
20 guess, ripping it open is, in fact, not in good condition,
21 so maybe that is immune. And leaving it on the porch in a
22 position where somebody would trip over it, you might say
23 they didn't deliver it in good condition, because what
24 they're supposed to do is place it somewhere where you
25 don't trip over it. And that's good condition for the

1 delivery.

2 MR. RADMORE: Well, it's not good condition for
3 purposes of ordinary torts. The exception bars a claim
4 against the Government for the contents of the package.
5 In your hypothetical, Justice Breyer, if the toupee were
6 damaged as a result of the package being opened, then you
7 could not make a claim, because that was the content of
8 the mail, but if you fell over the package, that's an
9 ordinary tort, that's a common duty between private
10 persons. So --

11 JUSTICE GINSBURG: As is a automobile accident,
12 and it -- the Chief suggested to you that there are other
13 kinds of people who deliver items. And that kind of
14 negligence, you say, is within the exception.

15 MR. RADMORE: I'm sorry, I don't --

16 JUSTICE GINSBURG: That --

17 MR. RADMORE: -- understand your --

18 JUSTICE GINSBURG: That you say --

19 MR. RADMORE: -- question, Justice Ginsburg.

20 JUSTICE GINSBURG: I'm sorry. Outside the
21 exception.

22 MR. RADMORE: Correct.

23 JUSTICE GINSBURG: So, there, you're saying that
24 the Post Office is just -- it's just like everyone else
25 with respect to automobile accidents, right?

1 MR. RADMORE: Yes, Justice Ginsburg.

2 JUSTICE GINSBURG: But -- and -- you --
3 therefore, it should be just like everyone else with
4 respect to this negligent delivery in --

5 MR. RADMORE: With respect to ordinary torts.
6 If they create -- if the Post Office creates a hazardous
7 condition, then they should be a -- responsible, just as
8 private persons are. We know that that's the purpose of
9 the broad waiver of sovereign immunity under the Federal
10 Tort Claims Act, is to make the Government -- or to allow
11 private persons to make a claim against the Government if
12 there is a duty that is common to private persons.

13 JUSTICE STEVENS: Mr. Radmore, I don't think
14 you're quite correct when you say, with regard to an
15 automobile accident, it's just like a private entity
16 delivering mail -- or delivering packages. If a private
17 delivery service had an automobile accident that resulted
18 in the destroy -- destruction of a package, a private
19 party could sue for the contents of the package. But
20 that's not true with regard to the Postal Service.

21 MR. RADMORE: That's absolutely correct, Justice
22 Stevens. And I believe that that's really the biggest
23 problem the Government has with their interpretation of
24 negligent transmission, because if there's an exclusion
25 for motor-vehicle accidents, then that would mean that

1 that exclusion would not only apply to the terms of the
2 exception "negligent transmission," but, if it's an
3 exclusion, as the Government has argued for, though they
4 haven't explained why the exclusion wouldn't apply to loss
5 and miscarriage, the logical endpoint of their exclusion
6 is that if you have a tractor-trailer that has 10,000 IRS
7 refund checks on it, and that tractor-trailer is in a
8 accident, and all of the refund checks are destroyed,
9 well, any private person who didn't get their refund check
10 in time, and couldn't pay their mortgage, or they couldn't
11 pay for their credit-card bill or they couldn't do
12 something as a result of the loss of those refund checks,
13 would be able to make a claim against the Government, as
14 long as the loss occurred from a motor-vehicle accident.
15 They make no explanation as to why that would not be the
16 case.

17 JUSTICE SCALIA: Well, you -- the -- you assert
18 that would be the case, don't you?

19 MR. RADMORE: No, I --

20 JUSTICE SCALIA: I mean, you assert that they
21 would be able to sue.

22 MR. RADMORE: Oh, not at all.

23 JUSTICE SCALIA: Oh. All right.

24 MR. RADMORE: If the -- any -- anytime that the
25 mail is lost, the mail is delivered to the wrong location,

1 the mail is damaged or --

2 JUSTICE SCALIA: Yes.

3 MR. RADMORE: -- delayed --

4 JUSTICE SCALIA: Okay. I gotcha.

5 MR. RADMORE: -- through negligence, regardless
6 if it's a motor-vehicle accident, then the Government is
7 protected. And so, it's --

8 CHIEF JUSTICE ROBERTS: But I guess -- I --
9 following up on Justice Stevens' question, your theory
10 with respect to negligent transmission is that the Postal
11 Service should be liable in the same way that private
12 parties are. But that theory doesn't hold up when you're
13 talk -- that's not your theory.

14 MR. RADMORE: That's not --

15 CHIEF JUSTICE ROBERTS: Well, then, what is your
16 --

17 MR. RADMORE: Our theory is, if there's damage
18 to the mail, there's an exception to --

19 CHIEF JUSTICE ROBERTS: Well, that's --

20 MR. RADMORE: -- some --

21 CHIEF JUSTICE ROBERTS: I would have thought
22 that was miscarriage.

23 MR. RADMORE: Damage?

24 CHIEF JUSTICE ROBERTS: Or loss.

25 MR. RADMORE: Well, if it was -- if it was the

1 same as miscarriage or loss, then that makes the whole
2 term "negligent transmission" superfluous. And this Court
3 has told us that every term in an -- in the -- any
4 exception should be viewed so as --

5 CHIEF JUSTICE ROBERTS: Well, it's only
6 superfluous under your reading. If it covers, for
7 example, putting the package -- negligently placing the
8 package in a location where it's going to cause injury,
9 well, then it's not superfluous.

10 MR. RADMORE: Well, in a broad -- that's true if
11 you're going to read the words so broadly that -- it would
12 then make "loss" and "miscarriage" superfluous."

13 JUSTICE SOUTER: But you're using --

14 CHIEF JUSTICE ROBERTS: No.

15 JUSTICE SOUTER: You're -- no, please.

16 CHIEF JUSTICE ROBERTS: I was just -- it
17 wouldn't make it superfluous at all. "Loss" would cover
18 loss. "Miscarriage" would cover damage. And "negligent
19 transmission" would be transmitting it negligently, such
20 as leaving it where somebody's going to trip over it.

21 MR. RADMORE: But the broad interpretation that
22 the Government asks for, and that the Third Circuit
23 followed, was that "negligent transmission" covered
24 anything that occurred to the mail from the time the mail
25 was dropped off at the Post Office until it arrived at a

1 third -- to the third person. So, with that broad
2 definition of "negligent transmission," anything that
3 occurred, whether it was a loss of the mail, whether it
4 was misdelivered to the wrong location, would be covered,
5 and that would make the words "loss" and "miscarriage"
6 superfluous.

7 JUSTICE SOUTER: But you're taking as your prime
8 -- or a prime example of what would be covered by the
9 exception of "negligent transmission" the package that is
10 delivered to the right place on time and all the china
11 inside the box is smashed. I mean, that would be an
12 example that would fit your theory.

13 MR. RADMORE: That's correct.

14 JUSTICE SOUTER: Yes.

15 MR. RADMORE: There would be a bar. The bar
16 would apply.

17 JUSTICE SOUTER: And you would -- you would say
18 that's supported by the -- you know, the noscitur a sociis
19 argument, because it's damage of -- to the mail, or the
20 condition of the mail, or the manner in which the mail
21 itself is delivered, but it -- that's more or less where
22 you -- where you think the exception should stop.

23 MR. RADMORE: That's more, rather --

24 JUSTICE SOUTER: Yes.

25 MR. RADMORE: -- than less. That's exactly

1 where we think --

2 JUSTICE O'CONNOR: Yes, your theory is basically
3 that the exception just deals with bad things that happen
4 to the mail.

5 MR. RADMORE: Well, it also would protect the
6 Government when there is a -- either a personal injury or
7 some kind of loss, a personal injury or an economic loss
8 that arises from the damage or delay to the mail. You
9 know, I think I brought up the example of the medication
10 or if -- if you had a check or a coupon bond that was
11 destroyed. There would --

12 JUSTICE SOUTER: But that would be, in each case
13 -- in each example you're giving, as I understand it, that
14 would be as a consequence to a violation that affected the
15 mail, itself, in the first place.

16 MR. RADMORE: Yes, Justice Souter.

17 JUSTICE SOUTER: I lose the -- I lose the money,
18 because the mail is slow, or whatever.

19 MR. RADMORE: Yes, Justice Souter, exactly.

20 And if there's no other questions, I'll reserve
21 the remainder of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Radmore.
23 Ms. Millet.

24 ORAL ARGUMENT OF PATRICIA A. MILLETT

25 ON BEHALF OF RESPONDENTS

1 MS. MILLETT: Mr. Chief Justice, and may it
2 please the Court:

3 Justice O'Connor, when you mentioned that this
4 is a waiver of sovereign immunity and we have to construe
5 that with that in mind, it's, sort of, central to our
6 starting to our point for understanding this statute.

7 This claim falls squarely within the text of the
8 statutory exception, and there doesn't seem to be much
9 dispute about that. And the question is whether --

10 JUSTICE STEVENS: But isn't it true that it
11 falls squarely within the word "transmission," just
12 exactly as an automobile accident arising out of carrying
13 -- transmitting mail does?

14 MS. MILLETT: It falls with --

15 JUSTICE STEVENS: They are both equally within
16 the plain language.

17 MS. MILLETT: It falls within the word
18 "transmission," but the relevant phrase is "negligent
19 transmission of mail or postal matter." And --

20 JUSTICE STEVENS: Which is happening in the --
21 in the truck when it has an accident.

22 MS. MILLETT: But what you're suing over in that
23 case -- and this is exactly the line this Court drew in
24 Kosak -- your claim isn't -- it has to arise out of the
25 negligent transmission of mail. Your claim, when the --

1 when the delivery truck or the postal truck rear-ends you,
2 doesn't arise out of the handling of the mail; it arises
3 out of the handling of the vehicle. There's two
4 activities going on at the same time, and you're suing
5 about the one, and not the other. And I think it's a --
6 it's --

7 JUSTICE KENNEDY: Well, suppose you have a big
8 crate that the postman uses, because you've been away for
9 a week and yet the mail -- and he leaves a crate there,
10 and you trip on the crate. Under your view, there would
11 be liability, because the crate's like the -- the crate
12 isn't the mail.

13 MS. MILLETT: I think, at that point, sort of,
14 the crate and the mail have become one thing, as if he
15 left it in a bag or he -- they put a plastic bag around it
16 to protect it from the rain, and technically you would
17 trip over the plastic bag, but it's the lump of mail that
18 you're tripping over. I mean, if the crate had some bar
19 sticking out, and all you tripped over was the bar and not
20 the mail, then that might be a different case. But I do
21 think that we have to look carefully at whether it arises
22 out of the handling of the mail. And that is a
23 distinction that protects the activity that the Postal
24 Service is engaged in that Congress wanted to protect, the
25 handling of the mail. It's a -- it's a protection for the

1 post, but it --

2 JUSTICE STEVENS: But the key word in the
3 statute is "transmission," not "the transmission of
4 letters or postal matter."

5 MS. MILLETT: The key words, I think, are the
6 whole exception, which is "arising out of the negligent
7 transmission of mail." It's not "negligent activities of
8 the Postal Service." The text focuses -- it's a
9 protection for the post, not the Postal Service.

10 JUSTICE STEVENS: But --

11 MS. MILLETT: And just as if you're --

12 JUSTICE STEVENS: But if that's true, why do you
13 need the words "miscarried" -- why do you need the word
14 "miscarriage" in the statute?

15 MS. MILLETT: I think "miscarriage" captures
16 delivery to the wrong person, which doesn't harm the mail,
17 itself.

18 JUSTICE STEVENS: But you -- but so would the
19 word "transmission" if you -- under your reading, you
20 don't need the word "miscarriage."

21 MS. MILLETT: What -- "transmission" adds a lot
22 -- I think if you look, sort of, sequentially, the way
23 Congress was thinking -- and it may not have been at, sort
24 of, this level -- but "loss" is mail that doesn't go
25 anywhere, it doesn't get there. "Miscarriage" gets to the

1 wrong person. "Transmission" gets to the right person,
2 but something went wrong in the process. And so, if you
3 look at it that way, yes, there's no doubt there's
4 overlap, but "transmission" captures a lot more than just
5 "miscarriage." It is important to understand that --

6 JUSTICE SCALIA: It covers damage, for one
7 thing.

8 MS. MILLETT: It covers --

9 JUSTICE SCALIA: You --

10 MS. MILLETT: It covers damage. It covers --

11 JUSTICE SCALIA: Which "loss" doesn't, and
12 "miscarriage" doesn't.

13 MS. MILLETT: Absolutely. And the same delay
14 may, or not, be with them. But the other thing that
15 Petitioner's theory doesn't capture -- they're two very
16 important things. One is the decision to admit things to
17 the mail in the first place. If it ends up being a
18 letterbomb or, unfortunately, anthrax, or biohazards -- I
19 mean, we ship poisons, we ship medical specimens, we ship
20 live alligators. I mean, every -- you wouldn't believe
21 what goes into the mail.

22 [Laughter.]

23 MS. MILLETT: And there has to be some
24 protection for that decision to admit things into the mail
25 in the first place. The other thing it doesn't capture is

1 the very important decisions that post -- the Post Office
2 has to make about getting the mail to someone on time.
3 Part of that is how I get it there. And it's -- it
4 includes not just how I get the millions of packages every
5 day that don't fit in a mailbox or a mail slot to their
6 customers; it includes how, after a hurricane, we decide
7 to deliver mail outside the Superdome or to people whose
8 mailboxes have been blown off of their houses.

9 JUSTICE BREYER: So, how does it hurt you, say,
10 in the live alligator, et cetera, case? If the Court says
11 -- well, anything that's special in respect to
12 transmission of live alligators, because it's the mail, et
13 cetera, delayed -- or I -- I don't know how else you'd get
14 a tort out of it. But if it's simply the kind of thing
15 that anyone could do, like driving a postal truck or
16 leaving something on a porch that somebody trips over or
17 walking along the street swinging the live alligator over
18 your head, or whatever you do --

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22 [Laughter.]

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JUSTICE BREYER: -- that kind of thing that

1 doing it -- that kind of thing doesn't mean to fall within
2 the "transmission." Now, suppose that that was the
3 holding. How would the Government be hurt?

4 MS. MILLETT: First of all, that -- if the -- if
5 the exception, as I understand it, is that of harms to or
6 from the content of the mail, that isn't going to --

7 JUSTICE BREYER: What we'd look to is, you'd
8 look to the purpose of this. The purpose of it was,
9 basically, I gather from the history, as recounted in
10 Kosak -- in what the Court said in Kosak -- the purpose of
11 this is to try to bring back into sovereign immunity, so
12 you're not sued all the time, the very kind of common suit
13 that a person could protect himself for the loss by
14 registering the package, by taking out this ordinary
15 transmission insurance, which is not that hard to do. So,
16 they said, if we start opening it up to misdelivery
17 claims, all that pack -- family of things, everybody'll
18 say, "Hey, you hurt my pet, you didn't give me the check."
19 I mean, all kinds of things will be opened up.

20 But the Government's already liable for what I'd
21 call the "swinging the package around," leaving it --
22 slip-and-fall, trucks. So that falls on the other side.
23 Now, how does that hurt you, the Government, if that's how
24 we'd come out?

25 MS. MILLETT: It hurts us -- I mean, my starting

1 point, first of all, is this text, and not legislative
2 history or purpose --

3 JUSTICE BREYER: Well, you can't get too far --

4 MS. MILLETT: -- which is --

5 JUSTICE BREYER: -- with the text. I think you
6 have a great claim, and so does the other side; but if
7 it's just the text, that's not my question.

8 MS. MILLETT: Okay. But I --

9 JUSTICE BREYER: The question is, If I think the
10 text is perfectly ambiguous on this, I look to the
11 purpose, suppose I came out the way I just said. How
12 would the Government be hurt? is what I want to know.

13 MS. MILLETT: What the Government is hurt by is
14 the fact that you're -- some -- you're allowing torts for
15 the one activity that is distinct to the Postal Service
16 amongst governmental agencies, and that is the act of
17 delivering. That is what the transmission exception
18 protects. When you're -- when you're driving a vehicle,
19 the postal employee is making the -- is not making mail-
20 specific judgments. The postal employee is making the
21 same judgments that I made driving to work today and that
22 everyone else on the road makes. But when you are making
23 decisions about how to deliver 660 million pieces of mail
24 a day to 142 million different locations -- the bottom of
25 the Grand Canyon, remote Alaska, and urban cities -- that

1 -- to get that job done, you have to be able to make
2 judgments about the actual act of delivery. And --

3 JUSTICE KENNEDY: Well, how is mail- --

4

5 CHIEF JUSTICE ROBERTS: And what if it's for --

6 JUSTICE KENNEDY: -- mail-specific any different
7 than the grocery boy -- I mean, than the grocery-specific,
8 under your view?

9 MS. MILLETT: No, but it's clear that Congress
10 wanted to capture negligence. I mean, it's the -- it --
11 the fact that -- there has to be an analog to private
12 people, or we're not in the Federal-Tort-Claims-Act land
13 anyhow. The question is, Which of those activities? And
14 the text focuses on --

15 JUSTICE KENNEDY: But you're --

16 MS. MILLETT: -- the actual --

17 JUSTICE KENNEDY: But you're saying -- you're --
18 you want us to say that mail is somehow unique. But it
19 isn't. There's all kinds of delivery.

20 MS. MILLETT: It -- whether or not it's unique,
21 Congress focused on the presence of mail in a mail-
22 specific judgment. That's how we read --

23 JUSTICE KENNEDY: But I'm saying --

24 MS. MILLETT: -- the text --

25 JUSTICE KENNEDY: -- it's not mail-specific,

1 because all delivery people have the same problem.

2 MS. MILLETT: The mail --

3 JUSTICE KENNEDY: So, why is it mail-specific?

4 MS. MILLETT: First of all, the decision to put
5 it into a mailbox is a uniquely postal --

6 JUSTICE SCALIA: Well, and letters are carried
7 in a mail truck, but we allow a cause of action for
8 negligence of the driver of the mail truck. That's unique
9 to mail, too.

10 MS. MILLETT: Drive the -- driving is not unique
11 to the mail. It's not, even amongst agencies, let alone
12 amongst private parties. The -- what --

13 JUSTICE SCALIA: You're leaving something --

14 MS. MILLETT: And it --

15 JUSTICE SCALIA: That was the very point,
16 leaving something on the porch where somebody can trip on
17 it isn't unique to mail --

18 MS. MILLETT: It doesn't --

19 JUSTICE SCALIA: -- just as driving a truck
20 isn't.

21 MS. MILLETT: It doesn't have to be unique to
22 mail. If it is unique to mail, if there's no private-
23 party analog, the Federal Tort Claims Act doesn't apply,
24 by its own terms. But what -- I mean, there is a distinct
25 and unique postal act of putting things into the mailbox.

1 JUSTICE BREYER: So, if --

2 MS. MILLETT: And if it --

3 JUSTICE BREYER: -- in fact, you have a driver
4 of the truck, the postal truck, and what he does is, he
5 puts the mail in the truck, so my skis, which I have
6 shipped by mail, happen to stick out the side, and, as he
7 walk -- drives along, he just mows down the pedestrians.

8 [Laughter.]

9 JUSTICE BREYER: I take it, on your theory, that
10 that -- there is no lawsuit.

11 MS. MILLETT: The -- if your damage -- harms to
12 and from the mail, yes. Yes, that is our position. If he
13 mows 'em down with his arm or with his rearview mirror on
14 his truck, your -- the liability attaches.

15 But you asked why it is important, Justice
16 Breyer. And one of the reasons it's very important is to
17 look at these types of claims. The Postal Service is
18 defenseless. We are essentially defenseless when we get
19 one of these claims. Unlike a vehicle accident, where we
20 are a party to it and know what happens when it happens,
21 this type of injury, we may not know about for up to two
22 years after --

23 JUSTICE KENNEDY: Well, let --

24 MS. MILLETT: -- it happens.

25 JUSTICE KENNEDY: -- let me ask you about

1 defenses. And it goes a little bit beyond the suit, but,
2 as I -- I read through the regulations, and it's the duty
3 of the occupant, or the recipient, of the mail to provide
4 a box or a letter slot or something. Would the failure to
5 do that, so that they just have to put it on the porch --
6 is that a defense?

7 MS. MILLETT: I'd --

8 JUSTICE KENNEDY: Let's assume there's
9 liability.

10 MS. MILLETT: Uh-huh.

11 JUSTICE KENNEDY: Let's assume that your
12 interpretation of the statute does not prevail here. Does
13 the Post Office have a defense if the person doesn't
14 provide a mailbox, as the regulations require?

15 MS. MILLETT: I'm not going to say here that we
16 wouldn't have some defenses that we may want to invoke at
17 a future time, but I'm not very optimistic, because I
18 think the fact that you -- they may not have a box doesn't
19 mean that we could put it -- assuming your theory that
20 we're liable -- put it somewhere negligently --

21 JUSTICE KENNEDY: Is --

22 MS. MILLETT: -- as opposed --

23 JUSTICE KENNEDY: Are there --

24 MS. MILLETT: -- nonnegligently.

25 JUSTICE KENNEDY: Are there regulations

1 requiring that the mail be put in a reasonably safe place?

2 And by that, I mean reasonably safe for the occupant, not
3 reasonably safe for the mail.

4 MS. MILLETT: It --

5 JUSTICE KENNEDY: You -- because you quote --
6 you quote, on page 2, the footnote -- you quote the
7 regulation. But I read that, that it has to be reasonably
8 safe for the mail, because it says, "Oh, you can leave it
9 on a stairway or under a porch, just so long as it's safe
10 for the mail." That's the way I read that one.

11 MS. MILLETT: I mean, I think they make the --
12 as a practical -- is there text in the Domestic Mail
13 Manual that specifically says, "Put it where somebody
14 won't slip"? No. I think it's the same judgment that's
15 being made. They're making the best judgments that they
16 can, but there is -- you know, they're, sort of, caught
17 between them. So, they need to put it somewhere where
18 it's sheltered, and that tends to be close up to
19 buildings. And the problem is, it's not --

20 JUSTICE KENNEDY: Well, I guess my point --

21 MS. MILLETT: -- once it's on the --

22 JUSTICE KENNEDY: -- my point is, if there's a
23 duty, then it seems to me the Post Office is used to
24 making these judgments. And if it does not make the
25 correct judgment, it can be sued.

1 MS. MILLETT: Well --

2 JUSTICE KENNEDY: I'm not saying --

3 MS. MILLETT: The --

4 JUSTICE KENNEDY: -- that you're creating a
5 cause of action.

6 MS. MILLETT: Right.

7 JUSTICE KENNEDY: I'm just saying that you're
8 not --

9 MS. MILLETT: The except --

10 JUSTICE KENNEDY: -- that much different than
11 any institution faced with slip-and-fall cases.

12 MS. MILLETT: The except -- it is different --
13 the exception applies whether we do it negligently or
14 nonnegligently. And so, the fact that we didn't happen to
15 do it, at least allegedly, negligently in this case isn't
16 what -- can't be what triggers the exception. And what is
17 different is, you -- understanding, as a practical matter,
18 what the postal carriers are supposed to do millions of
19 times every day when the mail doesn't fit --

20 JUSTICE BREYER: But are -- you got the -- well,
21 that's exactly the point I'd like you to hone in on,
22 because I don't see what's -- you say, "Well, we're
23 defenseless." Why are you more defenseless than any other
24 business that leaves things on porches? That might be,
25 you know, 482 million apple deliverers or Domino Pizza

1 people. I don't know. Or they -- they ring the bell,
2 probably, but some -- McDonald's hamburgers, lots of --
3 department stores. I mean, a lot of people leave things
4 on porches. So, why are you more defenseless than they?

5 MS. MILLETT: Because -- because we -- first of
6 all, we leave it there for 37 cents, and we leave it in a
7 volume -- 660 million pieces of -- a day. FedEx and UPS
8 aren't even in the neighborhood --

9 CHIEF JUSTICE ROBERTS: Well, are you talking
10 about --

11 MS. MILLETT: -- of that amount.

12 CHIEF JUSTICE ROBERTS: You're talking about
13 letters, though, right? I mean, I -- they -- is FedEx and
14 UPS in the neighborhood when you're talking about packages
15 --

16 MS. MILLETT: No.

17 CHIEF JUSTICE ROBERTS: -- of the size that have
18 to be left --

19 MS. MILLETT: No. We --

20 CHIEF JUSTICE ROBERTS: -- on the porch?

21 MS. MILLETT: 660 million includes letters and
22 packages.

23 CHIEF JUSTICE ROBERTS: Right.

24 MS. MILLETT: UPS does, I think, about 12
25 million a day; FedEx, about 5 million.

1 CHIEF JUSTICE ROBERTS: Well, what's the Postal
2 Service number for large packages?

3 MS. MILLETT: Large? I mean, they -- they don't
4 count it by large --

5 CHIEF JUSTICE ROBERTS: Yes.

6 MS. MILLETT: -- medium, or what will fit inside
7 the mailbags. I simply can't give you a number --

8 JUSTICE BREYER: All right. Well, that's --

9 MS. MILLETT: -- on that. But --

10 JUSTICE BREYER: -- that's what people are
11 likely to trip over. I mean, they're not likely to trip
12 over a letter.

13 MS. MILLETT: A number of letters bundled -- I
14 wouldn't -- I wouldn't be surprised to see what could
15 happen if, in fact, the liability is allowed. If you're
16 -- you know, you go to put it into the mailbox, and a
17 piece slips out of the mailman's hand and lands on the
18 porch, and it's one of those cellophane envelopes, and
19 it's slippery. I mean, that's --

20 JUSTICE GINSBURG: Do we have any sense --

21 MS. MILLETT: -- maybe all that it takes.

22 JUSTICE GINSBURG: -- of how many claims of this
23 nature there are? I know we do have the Second Circuit
24 case, on one side. And, by the way, I didn't notice that
25 you refer to the Second Circuit decision in your brief.

1 Did you?

2 MS. MILLETT: I --

3 JUSTICE GINSBURG: It --

4 MS. MILLETT: -- don't remember.

5 JUSTICE GINSBURG: -- goes --

6 MS. MILLETT: I know it was in our brief in
7 opposition, but I don't recall if I did in this.

8 JUSTICE GINSBURG: In the brief here -- well,
9 it's -- it surprised me that there were those two cases.
10 But, do you have any notion of how many slip-and-fall,
11 trip-over-mail cases -- claims are filed?

12 MS. MILLETT: I can give you a rough estimate.
13 There are -- there are 700 -- about 700 slip-and-fall
14 cases a year, but the vast, vast majority of those are
15 slipping in a building on, you know, a slippery floor,
16 which we concede liability for. Probably, you know --
17 less than a dozen, around ten or so a year, thus far. But
18 --

19 JUSTICE GINSBURG: You concede --

20 MS. MILLETT: -- we've been able to --

21 JUSTICE GINSBURG: -- liability for a slippery
22 fall in the Post Office.

23 MS. MILLETT: Yes. We --

24 JUSTICE GINSBURG: Yes.

25 MS. MILLETT: -- concede liability for that,

1 because that -- just like -- that's not handling of the
2 mail, that's handling of a building or handling of a
3 vehicle, which we see different from handling of --

4 JUSTICE GINSBURG: Well, there was --

5 MS. MILLETT: -- the mail.

6 JUSTICE GINSBURG: -- there was, in one of the
7 briefs, an example where there's a puddle created by the
8 janitor. The Post Office is liable. It's -- relates to
9 taking care of the building. There's a parcel of mail
10 that has a liquid in it, and it's dropped, and the puddle
11 is created by the that. No liability. And you agree that
12 that would be the result?

13 MS. MILLETT: If we break -- if we break --
14 whatever damage is done to the mail, and the package in
15 the mail, the liquid in the mail cannot be sued over.
16 That is -- and I think Petitioners agree -- damage to and
17 from the mail --

18 JUSTICE GINSBURG: So, you agree --

19 MS. MILLETT: -- is our conception.

20 JUSTICE GINSBURG: -- that that hypothetical --

21 MS. MILLETT: Yes.

22 JUSTICE GINSBURG: -- is correct? And there's
23 another one that they gave. The letter carrier comes.
24 He's got a mailbag filled with mail, dumps it on the
25 street while he takes a rest, somebody trips over it.

1 That's case one. Case two is, he's finished making his
2 rounds, and he dumps the sack on the street, it has no
3 mail in it, and somebody trips over it. On your theory of
4 the case, would there be liability in both situations or
5 only in the one where the mailbag was stuffed full of
6 mail?

7 MS. MILLETT: If you're tripping over mail, and
8 the mail bag has mail in it, there's no liability. You're
9 harmed from the mail. If it's from mail apparatus or, you
10 know, a postal employee's leg sticking out while they're
11 sleeping, then we will admit liability for that. The
12 focus -- our view of the focus of this exception, I think,
13 by its text -- and this is exactly what the Court said in
14 Kosak -- is on the handling of the mail, and that is a
15 very important line for the Postal Service. They have to
16 make hard judgments --

17 JUSTICE SCALIA: Except that you -- my biggest
18 hangup -- and I wish you'd go through your distinguishing
19 of it again -- is the -- is the Kosak case. Carrying the
20 mail in a mail truck is the handling of the mail. There
21 is no doubt that it's the handling of the mail. And it
22 seems to me it doesn't -- it isn't enough to say, "Well,
23 other people drive trucks, too." Well, that's true. But
24 other people deliver packages, too, and leave 'em on the
25 doorstep. How do you distinguish Kosak?

1 MS. MILLETT: I think -- in -- first of all,
2 it's just dicta in Kosak, which, in fact, construed the
3 customs exception to include both -- you know, not to turn
4 upon the type of damage that ensued, so we actually are
5 asking for the sort of same analysis of the holding in
6 Kosak -- the dicta in Kosak about motor vehicles is
7 different -- I think if I could just -- for the logical
8 reason, if someone rear-ends you, you don't --

9 JUSTICE SCALIA: Excuse me.

10 MS. MILLETT: Uh-huh.

11 JUSTICE SCALIA: You're -- I assume the
12 Government has conceded Kosak, the dictum in Kosak.

13 MS. MILLETT: Yes.

14 JUSTICE SCALIA: Now, do you concede that point,
15 or not?

16 MS. MILLETT: We --

17 JUSTICE SCALIA: If you concede the point, it
18 doesn't matter whether it's dictum.

19 MS. MILLETT: I agree, but --

20 JUSTICE SCALIA: So, you --

21 MS. MILLETT: -- I wanted to point out that the
22 holding --

23 JUSTICE SCALIA: -- you are trying to draw a
24 distinction between driving the mail in the truck and
25 leaving the mail on the doorstep. What's the basis for

1 that distinction?

2 MS. MILLETT: And that language has to be read
3 against the backdrop of the holding of Kosak, which
4 recognized that when you have exceptions that are written
5 in these broad terms, the form of the injury, the
6 particular type of personal injury -- there, it was
7 property injury -- that ensues doesn't change whether the
8 exception applies.

9 Motor vehicles are different. If you're rear-
10 ended by a truck, you don't jump out and say, "Hey, you
11 negligently transmitted the mail." You say -- you jump
12 out and you say, "You didn't -- your brake lights weren't
13 working," "You didn't signal." Those are -- there are not
14 judgments about the handling of the mail being made that
15 the claim arises out of. You're not suing about how we
16 handled the mail; you're suing about how we handled motor
17 vehicles. Yes, at --

18 CHIEF JUSTICE ROBERTS: But if the --

19 MS. MILLETT: -- 30,000 feet, it's all --

20 CHIEF JUSTICE ROBERTS: But if the postman
21 throws the box onto the porch and hits somebody there, you
22 say that's within the exception?

23 MS. MILLETT: Yes, that's -- if we --

24 CHIEF JUSTICE ROBERTS: But you don't say, "Hey,
25 you hit me with the mail," right? You say, "You hit me

1 with a box."

2 MS. MILLETT: Your claim arises out of how we
3 handled the mail, not how handled a vehicle, not how we
4 handled a building, not how we handled --

5 CHIEF JUSTICE ROBERTS: Your claim --

6 MS. MILLETT: -- mail apparatus.

7 CHIEF JUSTICE ROBERTS: -- arises out of how he
8 handled the box, just like --

9 MS. MILLETT: Yes.

10 CHIEF JUSTICE ROBERTS: -- in the other case it
11 arises out of how he handled the vehicle. You don't care
12 whether it's the mail or not. By the same token, when you
13 trip over something -- a box -- you don't care whether
14 it's a mail box or if it's the box from UPS. And yet, in
15 your case, it makes all the difference in the world.

16 MS. MILLETT: Perhaps I misunderstood. If -- I
17 thought the box was the mail, itself, that you're throwing
18 --

19 CHIEF JUSTICE ROBERTS: Yes.

20 MS. MILLETT: -- out of -- and if the box -- but
21 your injury arises -- if it's to or from the mail --

22 CHIEF JUSTICE ROBERTS: Right.

23 MS. MILLETT: -- it's within the exception.

24 And, yes, there are fine lines, as with any of these
25 distinctions. In practice -- in practice -- for the

1 practical reason that you don't have the sheer volume of
2 claims, against which the Postal Service is largely
3 defenseless, that you have when you start talking --

4 CHIEF JUSTICE ROBERTS: I suppose your --

5 MS. MILLETT: -- about delivering --

6 CHIEF JUSTICE ROBERTS: -- defense affects the
7 process. In other words, you would, more and more, be
8 leaving those -- the little slips of paper saying, "Go
9 down to the Post Office and pick up your package," rather
10 than leaving the package on the porch.

11 MS. MILLETT: I think that's exactly right. And
12 it's hard to -- I mean, that is -- you know, what happens
13 here when I show up with oversized mail, as a mail
14 carrier? I've got the choice of delaying your receipt of
15 the mail by taking it back to the Postal Service,
16 inconveniencing you, making you come downtown. That act
17 is within the exception. I can try a person-to-person
18 delivery. But the Postal Service went away from that, for
19 logical reasons, because that will delay everybody else's
20 mail, and there's no liability for all of those delays.

21 If you set this same package down, and it has
22 medicine or food in it -- it says -- marked "perishable"
23 on the outside -- it's in the sun, it goes rotten, the
24 person gets sick, there's no liability. But the -- this
25 is a protection for an activity of the Government, like

1 the -- many of the other Federal Tort Claim Act
2 exceptions. And the protection for that activity is an
3 upfront protection that doesn't turn on the happenstance
4 of which particular form of injury is manifested at --
5 hours later. And it's an important reason, as I said, not
6 only for the sheer volume of claims that we could face if
7 this is opened up on how we deliver, but all -- our
8 inability to defend, when, two years later, we simply do
9 not -- unlike FedEx or UPS, or probably the pizza
10 delivery, we can't recreate, months later, how we
11 delivered the mail --

12 JUSTICE KENNEDY: Yes, but you're --

13 MS. MILLETT: -- unless it's registered.

14 JUSTICE KENNEDY: -- you're using the word
15 "deliver," but the statutory word is "transmit." And --
16 are there other statutes or regulations in respect to the
17 Post Office that talk about "delivery"?

18 MS. MILLETT: There --

19 JUSTICE KENNEDY: Is the word -- because it
20 seems to me -- the omission of "delivery," it seems to me,
21 is a real problem for you, in your theory of the case.

22 MS. MILLETT: No, I don't think so. And, as we
23 chronicle at length in our brief, both through history and
24 contemporaneously, the use of the word "transmit" and
25 "transmission" in postal services is commonplace, and it

1 means delivery to -- it means getting something to the
2 person. Congress has consistently used "transmission"
3 that way.

4 And the other thing I would like to bring you
5 back to is, understand that the reason the vehicle
6 distinction worked -- one of the reasons Congress would
7 have expected that is, that had happened before in
8 history. We show, again in our brief, a number of cases.

9 For a long time, there have been distinctions between
10 allowing liability for -- and back then, it was stagecoach
11 drivers that drove too fast through town. And those cases
12 were held -- you know, when you -- when you held someone
13 liable for driving too fast through town, that was held
14 not to be a stoppage of the mail, stoppage of the
15 transmission of the mail. But when you tried to regulate,
16 more fundamentally, how the Postal Service decided to do
17 its deliveries, and whom it would authorize to undertake
18 the delivery, that was held to interfere with the mails.
19 And I think --

20 JUSTICE BREYER: What about -- but I'm surprised
21 that there's no empirical examples of what -- well, I
22 would think it would have happened, in 50 years and tens
23 of millions of packages, that a package falls off a truck.

24 You know, the next driver veers somewhere and gets into
25 an accident, and they say it was the -- it wasn't packed

1 properly. I think should have happened sometime in the
2 Post Service over -- Postal Service over 50 year. My
3 guess is, it did happen and you just paid.

4 MS. MILLETT: My guess is that we did not pay,
5 because that --

6 JUSTICE BREYER: Really?

7 MS. MILLETT: -- would be an injury rising --

8 JUSTICE BREYER: Is there any --

9 MS. MILLETT: -- to and from the --

10 JUSTICE BREYER: Do we actually know, either of
11 us? I don't, I confess. Do you -- do you --

12 MS. MILLETT: I don't, off the top of my head,
13 but I -- you know, the distinctions that -- in talking
14 with the Postal Service here, I mean, it may -- it -- one
15 would -- think it might have happened, but perhaps it
16 hasn't. Hopefully, it hasn't. But, if it has, I mean,
17 it's a fine distinction. And any tort -- you know, a
18 first-year tort student knows that tort lines can, you
19 know, give rise to difficult analysis at times. But if
20 you understand that what Congress was trying to protect
21 here was the movement of the mail and the handling of the
22 mail in a way that the Postal Service does --

23 JUSTICE SCALIA: Yes, but I don't --

24 MS. MILLETT: -- that really no one else --

25 JUSTICE SCALIA: -- I don't understand your last

1 distinction. You say there is no liability for the
2 package that falls off the back of the truck, but there is
3 liability if the truck hits another vehicle. I really
4 don't understand the basis for that distinction.

5 MS. MILLETT: The claim for the -- if we're
6 assuming it's a mispacking of the mail into the truck, is
7 the --

8 JUSTICE SCALIA: Right.

9 MS. MILLETT: -- is the claim --

10 JUSTICE SCALIA: Which happens all the time in
11 other trucks, not just mail trucks.

12 MS. MILLETT: -- then that is -- that is an -- I
13 mean, plain text of the statute, that is a -- an
14 allegation that we negligently transmitted the mail. We
15 handled it negligently in how we packaged it. And --

16 JUSTICE SCALIA: But you can say the same thing
17 about the driving of the truck that contains the mail.

18 MS. MILLETT: You can say that, but what -- when
19 someone's -- you know, sues, what they're upset about is
20 how you handled the vehicle, not how you handled the mail.

21 Yes, at 30,000 feet, you can look at this and say it's
22 all transmission. But Congress was looking at this as,
23 sort of, on-the-ground level. And, in practical
24 experience, the -- the person who was hit by the mail
25 truck doesn't care if there's mail in there or not. Their

1 injury is completely unaffected -- the presence of mail is
2 incidental, irrelevant --

3 JUSTICE SCALIA: Same thing with the --

4 MS. MILLETT: -- to that liability.

5 JUSTICE SCALIA: -- same thing with the person
6 who veers to avoid the package that falls off the back of
7 the mail truck.

8 MS. MILLETT: No, but that -- what they've been
9 injured by -- the presence of mail is the cause of the
10 accident --

11 JUSTICE KENNEDY: But that does --

12 MS. MILLETT: -- and the way it was packed --

13 JUSTICE KENNEDY: -- but the person who trips
14 doesn't say, "Oh, this really hurts me because it's mail
15 instead of a box of oranges," does he?

16 MS. MILLETT: "Who put this mail here? This is
17 -- this is -- mail shouldn't be here." I mean, you have
18 -- a simple way of looking at it is, you have two things
19 going on at the same time in the car, in the vehicle.
20 You've got the regular activity of driving, and you've got
21 the transmission of mail. But when you come to the porch,
22 you have one activity, and one activity only.

23 JUSTICE SOUTER: No, but --

24 MS. MILLETT: And that is transmission --

25 JUSTICE SOUTER: -- your argument, as I

1 understand it, on the -- on the truck accident and on the
2 package that falls out of the truck -- is that the fact
3 that mail transmission is going on at the same time is
4 utterly irrelevant to the cause of the damage. And isn't
5 it equally open to the -- isn't your position equally open
6 to the argument that, when the person trips over the
7 package on the porch, it is utterly irrelevant that that
8 package has been placed there by a postal employee and has
9 been carried in the mail? It is in the same -- it has the
10 same character, vis-a-vis tripping, that a brick or a rock
11 or any other package might have.

12 So, if you're going to be consistent with
13 respect to the passage of the truck, the package that
14 drops out of the truck, and the piece -- and the package
15 on the porch, don't you have to say it is irrelevant that
16 the package in the porch has been carried in the mail and
17 put there by a postal employee? It's its character of
18 package at that place that matters.

19 MS. MILLETT: It's the character as mail that
20 matters. Mail that's been in transmission is what
21 matters. And this --

22 JUSTICE SOUTER: No, but you can say -- then you
23 can say exactly the same thing about the package that
24 falls off the truck. You can characterize that. You can
25 say, "Look, it wouldn't have been in the truck if they

1 weren't delivering mail."

2 JUSTICE SCALIA: She says that.

3 MS. MILLETT: What direct --

4 JUSTICE SOUTER: Pardon me? But you -- and you
5 could say that there wouldn't have been any accident with
6 the truck if the truck hadn't been delivering mail.

7 MS. MILLETT: It may not be delivering mail at
8 the time it has an accident with you. There's no way the
9 delivery of mail occurs without the actual delivery of
10 mail. That's the point. But, again, you have a text here
11 that does not admit of distinctions based on what kind of
12 injury happens two hours later, whether it's spoiled food,
13 an exploding package, or a trip. And if it's difficult --
14 this is a waiver of sovereign immunity. And the fact that
15 this is in the text, this case doesn't involve a vehicle,
16 and that this case raises serious concerns for the Postal
17 Service about how it's going to handle an enormous --

18 JUSTICE STEVENS: But can I just --

19 MS. MILLETT: -- volume of mail.

20 JUSTICE STEVENS: -- this question? The case is
21 a little bit on the border, because it's a slip-and-fall,
22 and it does -- there may not have been negligence. We --
23 but we're assuming, via the allegations, they're true.
24 But your position would apply to an intentional tort, as
25 well as a negligent tort, I think, wouldn't it?

1 MS. MILLETT: Not if it's transmission of the
2 mail, because the exception only applies to negligent
3 transmission of the mail. And so, if we intentionally bop
4 you over the head with the package, that would not be
5 within --

6 JUSTICE STEVENS: I see.

7 MS. MILLETT: -- the exception.

8 JUSTICE STEVENS: Okay.

9 JUSTICE SOUTER: Would that -- this is neither
10 here nor there, I guess, but would that be within the
11 waiver?

12 JUSTICE GINSBURG: Negligence --

13 JUSTICE SOUTER: It's --

14 JUSTICE GINSBURG: Intentional --

15 JUSTICE SOUTER: It's --

16 JUSTICE GINSBURG: -- torts aren't covered --

17 JUSTICE SOUTER: Yes.

18 JUSTICE GINSBURG: -- by it, are they?

19 MS. MILLETT: No, actually negligent or wrongful
20 acts are covered. There's 2680(h), which covers a number
21 of intentional torts and -- it's often referred to as the
22 intentional-tort exception. But, actually, it wouldn't
23 cover -- the -- bopping with a package would probably be
24 assault. But if we deliver a package that has anthrax in
25 it, I don't know that that would be covered. Maybe we

1 would try and argue --

2 JUSTICE SOUTER: Well, only --

3 MS. MILLETT: -- that's fault of the --

4 JUSTICE SOUTER: -- because you weren't

5 intention -- your --

6 MS. MILLETT: Right.

7 JUSTICE SOUTER: -- intent was not to deliver

8 anthrax.

9 MS. MILLETT: Right. But not all --

10 JUSTICE SOUTER: But if the intent is to hit the

11 person with the alligator that you're swinging --

12 MS. MILLETT: But not -- right.

13 JUSTICE SOUTER: -- that would be an intentional

14 --

15 MS. MILLETT: But not all --

16 JUSTICE SOUTER: -- tort in --

17 MS. MILLETT: -- intentional torts fall within

18 2680(h). If I don't like you, and I intentionally deliver

19 your mail to your neighbor, knowing that it's got your

20 inheritance information in it, I don't think that would

21 fall within 2680(h), which normally -- it's essentially --

22 largely encompasses interference with contracts rights

23 instead of physical assault, battery, those types of

24 claims.

25 But, again, I think it's very important to keep

1 in mind here that we do have -- we have text -- this is a
2 waiver of sovereign immunity, and that this falls within
3 the text. There are two ways of looking at it. Their way
4 does not capture important things to the Postal Service.
5 It doesn't seem to capture what is admitted into the
6 mails, and it doesn't seem to capture the important
7 decisions that are made -- it may not seem so important,
8 in this one case, to have put the mail on the porch, but
9 multiply it by tens of millions of times a day when that
10 decision is made, and the decision that that balance, of
11 putting things there in a sheltered way, hopefully that
12 will both protect the mail and the people, instead of
13 either reverting to person-to-person delivery for all
14 oversized mail or making people come down, like the old
15 days, to the Post Office to pick it up.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

18 Mr. Radmore, you have 7 minutes remaining.

19 REBUTTAL ARGUMENT OF JAMES R. RADMORE

20 ON BEHALF OF PETITIONER

21 MR. RADMORE: Just one point. The choice of
22 what to take into the mail would be covered by the
23 discretionary-function exception of the exceptions to the
24 Federal Tort Claims Act. So, I think that's a red
25 herring.

1 And with that, if there's no questions, the
2 Petitioner will waive the remainder of his rebuttal.

3 CHIEF JUSTICE ROBERTS: Do you have any -- I
4 mean, you'll be responsible, if you prevail, for all of us
5 having to go down to the Post Office every time we get --

6 [Laughter.]

7 CHIEF JUSTICE ROBERTS: -- packages. I mean, it
8 there --

9 MS. MILLETT: Well, then I'll probably --

10 CHIEF JUSTICE ROBERTS: -- do you have any
11 response to that policy concern?

12 [Laughter.]

13 MS. MILLETT: Then I'll probably be subject to
14 some intentional torts, myself.

15 [Laughter.]

16 JUSTICE GINSBURG: What about the practical
17 problem that was raised that, in the automobile accident,
18 there's witnesses, there's a police report, usually; but a
19 slip-and-fall over mail, nobody's around, these are easily
20 made up, and the Post Office has no opportunity to check?

21 MR. RADMORE: The Post Office has every
22 opportunity, just as in any ordinary tort. All the
23 defenses apply. In this particular case, the Post Office
24 -- and it's been alluded to by several Justices -- would
25 be that they have the defense of contributory negligence.

1 They would have any defense that would be available --

2 JUSTICE GINSBURG: But the point that -- I think
3 that they were making is that there will be an
4 investigation, on the spot, ordinarily, in the case of a
5 vehicle collision. Post Office won't even know about the
6 slip-and-fall until a claim is filed, which could be weeks
7 and weeks later.

8 MR. RADMORE: But that's -- that's the situation
9 in any tort. There doesn't have to be a police report,
10 necessarily, in an automobile accident. And in a -- any
11 slip-and-fall or any tort, beyond the motor vehicle
12 accident, it's the same situation. It's not unique to the
13 Post Office.

14 CHIEF JUSTICE ROBERTS: Yes, but the volume is
15 unique. In other words, there aren't going to, in a
16 typical case, be a lot of witnesses, and the volume is
17 unique. And you can't bring the postal carrier in, two
18 years after the fact, and say, "Do you remember where you
19 placed this parcel on this porch on this day?"

20 MR. RADMORE: That's what you'd have to do to a
21 UPS or a Federal Express employee. And I believe
22 Solicitor General's response to Justice Ginsburg question
23 about the number of claims that you have a year -- I
24 believe the Solicitor General said situations like this
25 arise ten times a year. And the Postal -- the Post

1 Office's own handbook dealing with the handling of
2 negligence cases sets forth procedures and policies that
3 deal exactly with this type of circumstance. If we were
4 to look at the handbook -- I think, Justice Kennedy
5 referred to the handbook, and that section 141 of the
6 Postal Investigation Handbook talks about claims that
7 arise for personal injury or property damage during the
8 delivery of the mail. So, at least since -- and that's
9 been -- that was put in place in 1992, so we at least
10 know, for the last 13 years, that they've anticipated
11 these type of claims. And, according to the Government,
12 there's only been ten a year. So, I don't think that
13 there's a real concern by the Post Office that there's
14 going to be some -- a floodgate of litigation opened up.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 The case is submitted.

17 [Whereupon, at 11:01 a.m., the case in the
18 above-entitled matter was submitted.]

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