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

BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

HAROLD KRENT
Counsel of Record
CHICAGO-KENT COLLEGE OF LAW
565 W. Adams Street
Chicago, IL 60661
(312) 906-5010

Counsel for Amici Curiae

July 14, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the discrete postal matter exception to Congress's otherwise broad waiver of the government's immunity under the Federal Tort Claims Act, which bars claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. § 2680(b), also bars claims based on physical injuries caused by the negligent acts of postal service employees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES AND RULES:

LEGISLATIVE MATERIALS:

OTHER AUTHORITIES:

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF)[1] is a national, nonprofit public interest law and policy center advocating free enterprise principles and government accountability. WLF is interested in the regulation of the U.S. Postal Service, having participated in relevant proceedings before the Postal Rate Commission, the President's Commission on the U.S. Postal Service, and the Federal Trade Commission. WLF believes that the USPS should not operate at a competitive advantage over private carriers or be immune from liability where Congress has not expressly provided for such immunity. To that end, WLF filed an amicus curiae brief in *Flamingo Industries, Inc. v. U.S. Postal Service*, 540 U.S. 736 (2004).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation founded in 1964. AEF is dedicated to promoting education and has regularly appeared as amicus curiae in this Court, including joining as co-amicus with WLF in *Flamingo Industries*.

Amici oppose expansively construing the Federal Tort Claims Act to exempt the Postal Service from liability for injuries it causes to its customers and members of the public. Accordingly, amici believe that it is in the public interest to hold the USPS accountable for its negligent acts to the same extent that private carriers would be liable, except for the limited circumstances specified by Congress not applicable here.

---

[1] Pursuant to S. Ct. R. 37.6, amici hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The court below erred in expansively construing the postal matter exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(b), which excludes from suit "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." According to the court and respondent United States Postal Service (USPS), the exception precludes suit not only for injuries stemming from loss, damage, or delay of the mail itself, but also from any physical injuries caused by postal service employees in delivering the mail.

As an initial matter, the interpretation of the exception adopted by the court below cannot be reconciled with this Court's analysis in *Kosak v. United States*, 465 U.S. 848 (1984). There, this Court explained that "[o]ne of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault." *Id*. at 855. In context, "any claim" refers to those claims stemming from the loss, damage, or delay of letters or other postal matter. No claims can be made for mail that is lost or miscarried or negligently transmitted, whether because of delivery to the wrong address or because of a crash of a postal vehicle. When the claim does *not* arise out of damage to the mail or delay in delivery, the FTCA provides an avenue for relief. Indeed, the USPS's own Handbook on Investigating Accidents lists "common sources of tort claims" that have been recognized against the USPS to include not only "[a]ccidents resulting in injuries caused by unanchored or incorrectly anchored collection boxes," but also "[p]ersonal injury or damage to customer's property . . . [d]uring the delivery operation," the very category of claims in which petitioner's asserted injury falls. U.S. POSTAL SERV., ACCIDENT INVESTIGATION – TORT CLAIMS, HANDBOOK PO-702 § 141 (1992).

The court below, however, construed the exception for claims arising out of "negligent transmission" of the mail to include any claim arising during "the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." *Dolan v. U.S. Postal Serv.*, 377 F.3d 285, 288 (3rd Cir. 2004). Such construction would, on its face, immunize the USPS even from claims arising out of crashes with postal vehicles. The construction offered by the USPS in its Brief in Opposition to the Petition for Certiorari fares no better. Opp. Cert. at 6. It interprets the exception to "protect the core delivery function of the USPS," *id.*, which again would preclude claims arising out of the crash of a delivery truck, unless the USPS can suggest why a delivery truck is not part of the core delivery function of the USPS. And, if "transmission" refers only to the core delivery function as opposed to the entire process of sorting, storing, and delivering mail, then claims alleging damage or delay in delivery due to causes not within the core delivery function – whether due to a work stoppage, anthrax threat, or whatever – could be asserted under the Act, a result that Congress did not likely intend. Such parsing of the statute makes little sense given the underlying goals of the FTCA.

Instead, Congress drew the line between claims stemming from loss, damage and delay of the mail and other injuries, whether to individuals or private property. The very structure of the statute lends support to that delineation. This Court has embraced the canon of *noscitur a sociis* to avoid "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). The terms "miscarriage" and "loss" both refer to injury arising from damage to the mail itself, so the neighboring term "negligent transmission" should be understood in the same light.

The legislative history confirms that Congress, through the postal matter exception, sought to exclude injuries stemming from loss, damage or delay of the mail. Sponsors repeatedly stressed that "the bulk of the cases we are trying to take care of are personal injury cases caused by automobiles of the Post-Office Service," *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 17 (1932) (statement of Assistant Attorney General Charles Rugg), and that such injuries are different from damage to the mail because "[e]very person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations . . . . It 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." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 38 (1940) (statement of Special Assistant to the Attorney General Alexander Holtzoff) (emphasis added).

Finally, the lower court's reliance on the canon of strictly construing waivers of immunity flatly contradicts this Court's teachings in *Smith v. United States*, 507 U.S. 197 (1993), and in *Kosak* that the canon is inapplicable in construing the exceptions in the FTCA given the broad waiver embodied in the FTCA itself. *Smith*, 507 U.S. at 203 ("we should not . . . assume the authority to narrow the waiver that Congress intended."). Thus, this Court should construe the postal matter exception to preclude only claims arising out of loss, damage or delay of the mail itself to conform to the statutory language, structure of the exception, and legislative history.

ARGUMENT

I. THE FTCA PERMITS CLAIMS FOR PHYSICAL INJURY CAUSED BY THE NEGLIGENCE OF POSTAL SERVICE EMPLOYEES

The statutory construction issues in this case may seem quite narrow. At stake is whether the postal matter exception to Congress's broad waiver under the FTCA of the government's immunity from tort, which covers "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. § 2680(b), exempts from suit physical injuries as well as harm arising from loss, damage, or delay of the mail itself. Underlying the dispute, however, are two issues with far greater import: first, the extent to which the USPS should be liable for routine torts of its employees; and second, whether the canon of strictly construing waivers of immunity apply to such interstitial statutory construction issues once a broad waiver of immunity plainly has been effected. Construing the postal matter exception broadly neither accords with Congress's underlying purpose in crafting what this Court has termed a "narrow" exception, *Kosak*, 465 U.S. at 855, nor with sound policy considerations for ensuring liability of the USPS when the negligence of its agents injures individuals who can neither anticipate nor easily insure for the harm.

Congress waived the government's immunity from tort suit in the Federal Tort Claims Act, 28 U.S.C. § 2674, in 1946. The Act provides that the United States generally shall be liable to the same extent as any private party "for injury or loss of property, or 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." 28 U.S.C. §§ 1346, 2674. Congress crafted thirteen exceptions to its broad waiver of immunity to preserve the government's policymaking and protect the

government from excessive exposure to lawsuits. 28 U.S.C. § 2680(a)-(f), (h)-(n). For instance, Congress created exceptions for torts "caused by the fiscal operations of the Treasury or by the regulation of the monetary system," § 2680(i), for those "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," § 2680(j), and those "caused by the imposition or establishment of a quarantine by the United States." § 2680(f). Lawsuits arising out of government negligence in these contexts could be ruinous to the public fisc. Moreover, Congress protected government policymaking through the discretionary function exception which, as its name suggests, shields the United States from liability based on its officials' exercise of discretionary functions. 28 U.S.C. § 2680(a). Congress therefore sought to ensure that tort claims against the government would not result in second-guessing government policy as under the discretionary function exception, or result in crippling judgments, as under the Treasury, combatant, and quarantine exceptions.

A. The Language and Structure of the Postal Matter Exception Strongly Suggest that Congress Intended to Exclude Only Claims Stemming From the Loss, Damage, or Delay of Letters and Other Postal Matter

The USPS in this case relies on the postal matter exception to excuse liability. That exception exempts "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" from the broad waiver of the government's immunity under the FTCA. At first glance, the exception might be construed expansively to immunize the postal service completely from suit. Whether the postal service is sorting, storing, or delivering mail, the USPS in some sense engages in "the transmission of letters or postal matter." Such interpretation, however, would defeat the very purpose of the Act in waiving the USPS's

immunity and exposing it to routine torts. Nonetheless, the court below adopted an interpretation of the postal matter exception nearly that broad. *Dolan*, 377 F.3d at 288. It held that "negligent transmission . . . means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter," and thus that all claims arising out of that process are precluded. *Id*. Similarly, the USPS argues in this Court that the exception should be read to bar all claims arising out of "the core delivery function of the USPS." Brief in Opp. Cert. at 6.

Such interpretations of the exception are wholly unpersuasive. In *Kosak*, this Court explained that the "motivation" for the postal matter exception "is not hard to find. One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault." 465 U.S. at 855. This Court continued that, "[i]n order to ensure that § 2680(b) . . . did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility – namely, 'the loss, miscarriage or negligent transmission of letters or postal matter' – thereby excluding, by implication, negligent handling of motor vehicles." *Id*. Negligent transmission refers to claims asserting negligence in ensuring that the mail reach the consumer undamaged and on time.

The interpretations of the USPS and court below cannot be squared with this Court's statement in *Kosak* that Congress sought to allow claims for injuries arising from accidents with postal vehicles. The "process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS

delivers the letter or postal matter" plainly includes delivery whether by plane, car, or foot. Neither the court below nor USPS explained why transporting mail in a postal vehicle should not be considered part of "conveying" postal matter or part of the "core delivery function of the USPS."

Assuming, instead, that the court below and USPS intended somehow to carve out vehicular accidents from the postal matter exception, then their construction of the statute leads to incoherent results. For instance, if motorists can sue for injuries from a crash with a postal vehicle, then consider whether a claim can be made for damages to a car resulting from being struck by a heavy mail bag falling from the roof of a passing postal vehicle where the postal employee negligently left the bag on the roof. If that claim is barred, then why treat that crash differently from a crash with the postal vehicle itself? On the other hand, if the USPS is liable, as amici contend, then suit logically can be pursued for the negligent placement of mail on a doorstep as well as for the negligent placement of the mailbag on top of the vehicle. Similarly, consider whether a pedestrian can recover for tripping over a mailbag negligently left near a neighborhood collection box.[2] If suit is barred, again it would not be clear why that accident should be distinguished from a car crash. And, if the USPS is liable, then negligent placement of the mailbag cannot readily be distinguished from negligent placement of the mail as in this case. This Court should not attribute to Congress such arbitrary distinctions.

---

[2] Moreover, under the construction advanced by the USPS, consider whether individuals can sue who suffer injury to their persons or property from a postal carrier's negligence in delivering the mail at their homes, whether because the carrier carelessly steps on prize orchids or negligently uses mace to neutralize the family pet. It is difficult to believe that Congress, in waiving the USPS's immunity, intended such routine claims for injury to go un-redressed just because the carrier was in the process of "transmitting" the mail.

Not only do the interpretations offered by USPS and the court below depart from the teachings of *Kosak*, they are inconsistent with this Court's many holdings that statutes should be interpreted so as to give effect to each term in the statute. Under the court of appeals' construction, for instance, the terms "loss" and "miscarriage" are superfluous, for the "process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter" would include loss and miscarriage of all mail. This Court has repeatedly held that courts should interpret statutes to give effect to each separate term adopted by Congress: "Congress intended each of its terms to have meaning. 'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting.'" *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citing *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Thus, if this Court's statement in *Kosak* is to be followed and each term in the statute accorded distinct meaning, the exception must be read as something far less broad than covering *all* injuries related to transporting, sorting, and delivering the mail.

Moreover, the "core delivery function" gloss put forward by the USPS is also problematic in that it would allow damage claims to mail that did not fall within the terms "loss" or "miscarriage" to go forward as long as the damage or delay stemmed from postal service negligence in an area that was not closely linked to the "core delivery function." For instance, under the USPS's view, customers could sue for delay of mail due to a work stoppage at the USPS or delay due to negligent handling of an anthrax scare – events not closely tied to the core delivery service. Indeed, consumers could sue for delay or damage to the mail arising out of a plane or car crash given that such conveyance, in the USPS's view, evidently is not tied closely enough to the core delivery service to come within the exception. Yet, such

claims for damage and delay are the very type of claims that Congress wished to avoid in crafting the postal matter exception.[3] In short, USPS's reading of the exception is both overinclusive and underinclusive

The most compelling alternative reading of the exception is that Congress intended the exception to cover all injuries stemming from loss, damage or delay of the mail itself, much as the Second Circuit Court of Appeals determined in *Raila v. United States*, 355 F.3d 118, 122 (2d Cir. 2004). "Any claim," in other words, should be read to refer to those stemming from loss, damage, or delay of letters or other postal matter. Damage when mail is lost cannot be recovered, nor can damage to mail when it is miscarried or negligently transmitted. But for the exemption, the Postal Service uniquely would be exposed to ruinous lawsuits based upon such losses, and would be in a poor position to evaluate the credibility of the possibly overwhelming claims. It would be difficult after the fact to determine when the mail had been delivered, and the shape it was in upon delivery. In contrast, harm to individuals can be evaluated by physicians,

---

[3]Perhaps recognizing the difficulties in its attempted refinement, USPS then argues that Congress intended to protect the United States from suits arising out of functions "unique to the performance of postal services." Opp. Cert. at 6. Again, this gloss cannot be derived from the language of the statute itself. Moreover, it would place courts in the problematic position of trying to separate postal service functions that are unique from those that are not. Indeed, the difference between the USPS delivering mail and private carriers delivering packages is unclear. Similarly, private carriers both sort and store letters and packages. The "unique performance" refinement therefore fails to distinguish one part of USPS functions from any other. To be sure, only the Postal Service is authorized to deliver to post office boxes or mailboxes on particular routes. But, the USPS has recognized claims when customers slip on the way to post office boxes, or when customers trip over neighborhood collection boxes. *See infra* at pp. 11-13. The "unique performance" distinction does not bear any weight.

and there is less risk of manipulation. Most often, there will be a witness, and forensic evidence may be left.

The above reading of the statute, unlike that of the court below, accords a different meaning to each term in the statute. Congress included the term "transmission" to account for damage to mail arising from sorting or storage mishaps, which might not be covered by the terms "loss" or "miscarriage," but did not intend to enlarge the exception by immunizing the government from injuries to individuals. Moreover, such reading of the statute follows this Court's recognition in *Kosak* that routine torts causing injury to individuals do not fall within the exception.[4] Thus, the wording and structure of the statute call for reading the exception to preclude only claims stemming from loss, damage, or delay of letters and other postal matter.

Indeed, USPS's internal guidelines support the above construction of the exception. Management Instruction T-9, issued by Assistant Postmaster General Arthur Porwick, lists the most "common sources of tort claims" meritoriously filed against the USPS as follows:

> a. Motor vehicle accidents involving government-owned or privately-owned or leased vehicles operated by postal employees in the scope of their employment.

---

[4]As the only treatise on the Federal Tort Claims Act summarizes, "The [postal matter] exclusion was not, of course, intended to bar suit under the Act for the ordinary torts of postal employees, as where the negligence of a postal driver results in a collision and in injuries to a claimant." Jayson & Longstreth, *Handling Federal Tort Claims* § 13.01 (2005). At the time the bill was considered in Congress, Professor Borchard similarly characterized the exception as narrowly covering only "claims arising out of the loss or miscarriage of mail matter." Edwin M. Borchard, *The Federal Tort Claims Act*, 1 U. CHI. L. REV. 1 n.2 (1933).

> b. Falls in and around buildings owned, leased, or otherwise occupied by the Postal Service.
>
> c. Accidents resulting from tripping over an exposed USPS collection box anchor or USPS neighborhood delivery and collection box unit (NDCBU) anchor bolts.
>
> d. Accidents resulting in injuries caused by unanchored or incorrectly anchored collection boxes and NDCBUs.
>
> e. Damage to customer's property during the delivery operation.

USPS, MANAGEMENT INSTRUCTION, ACCIDENT INVESTIGATION TORT CLAIM ACTIVITIES, PO-730-90-01 at 1 (Jan. 8, 1990). Thus, the USPS has recognized that claims asserting physical injury connected to the delivery process, whether a slip in picking up mail at the post office or a stumble over a collection box, fall outside the exception and should not be considered "claims arising out of the . . . negligent transmission of letters and other postal matter." As noted, the Management Instruction also recognizes claims for physical damage to a homeowner's property during delivery. The claim in this case – for physical injury due to negligent placement of the postal matter – is directly analogous.

USPS, ACCIDENT INVESTIGATION –TORT CLAIMS, HANDBOOK PO-702 (June 1992) on investigating and handling accidents, issued by the same Assistant Postmaster General, supports petitioner's construction of the exception even more powerfully. Section 141 recognizes claims for "*[p]ersonal injury* or damage to customer's property during the delivery operation." *Id*. at 7 (emphasis added).[5] That is

[5] The USPS Management Directive and Handbook are both

precisely what has been alleged here: a claim for "personal injury . . . during the delivery operation." Thus, the USPS has recognized claims like the one in this case, and its new interpretation of the statute cannot be squared with either historical practice or the guidance it provides in its manuals.

Finally, the USPS in the court below asserted that construing the postal matter exception to exclude physical injuries would open a floodgate of litigation. Br. at 21-23. Yet, for years the USPS handbook has stated that claims can be made for "personal injury or damage to a customer's property during the delivery operation," and yet no avalanche of cases has descended on the USPS. Indeed, the very paucity of reported lawsuits asserting physical harm in the sixty years after enactment of the FTCA suggests that permitting suit for physical injuries would not unduly burden the USPS. In Section 2680(b), Congress limited the general waiver of immunity so as to shield the Postal Service only from claims for loss, damage, or delay of the mail.

B. The Interpretive Canon *Noscitur a Sociis* Further Demonstrates Congress's Intent to Preclude Only Claims Stemming From Loss, Damage or Delay of Letters and Other Postal Matter

Application of the interpretative canon of *nosictur a sociis* confirms the above reading of the statutory exception. *Noscitur a sociis* "is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. IMPAC Ltd., Inc.*, 432 U.S. 312, 322 (1977); *Jarecki v. Searle*, 367 U.S. 303, 307 (1961). Relying on *noscitur a sociis* helps courts avoid "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson,* 513

---

evidently still in use. *See www.usps.com/cpim/ftp/pubs/pub223.pdf.*

U.S. at 575.

The principle of *noscitur a sociis* has been applied to a variety of statutes covering a wide range of topics. For example, in *F.W. Fitch Co. v. United States*, 323 U.S. 582 (1944), Fitch brought an action against the United States in order to recover an alleged overpayment of the manufacturers' excise tax. The Internal Revenue statute in question included the phrase that a "transportation, delivery, insurance, installation, or other charge shall be excluded from the price." *Id*. at 584. The petitioner contended that advertising and selling expenses fell within the term "other charges" and thus were excludable under the statute. *Fitch,* 323 U.S. at 584. Applying the rule of *noscitur a sociis*, the Court noted that advertising and selling expenses are not comparable to the "specified charges for transportation, delivery, insurance, or installation – all of which are incurred subsequent to the preparation of an article for shipment." *Id*. at 585. The Court reasoned that the "other charges" term should be read to reflect expenses similar in character to those incurred for transportation, delivery, insurance and installation. *Id*. at 586. Because advertising and selling expenses are not analogous to the specifically listed items, they must be included in the tax base. *Id*.

For another example, in *Jarecki* the dispute centered on whether income from the sales of certain new products fell within the statutory definition of "abnormal income" which allowed the company to allocate some of this income to years other than those in which it was received for the purpose of computing the higher tax rate imposed during the Korean War. 367 U.S. at 304-05. The phrase in question defined "abnormal income" as income "resulting from exploration, discovery, or prospecting, or any combination of the foregoing." *Id*. at 305. One petitioner argued that its research on two drugs should fall into the discovery exemption, and another petitioner argued that its new camera

device should fall within the discovery exemption as well. *Id*. at 305-06. The Court looked to the surrounding words to ascertain the proper meaning of "discovery." *Id*. at 307. The three words used in conjunction (exploration, discovery, and prospecting) all described income producing activities in the oil, gas, and mining industries. *Id*. "The application of the maxim [*noscitur a sociis*] here leads to the conclusion that 'discovery' means only the discovery of mineral resources." *Id*.

The terms "miscarriage" and "loss" in this case both refer to injury arising from damage to the mail itself. Under the construction rule of *noscitur a sociis*, the neighboring term "negligent transmission" should be understood in the same vein. Congress sought to protect the United States from claims stemming from loss, damage, or delay of the mail.

C. The Legislative History Confirms that Congress Intended to Exempt Only Those Claims Stemming From Loss, Damage or Delay of Letters and Other Postal Matter

Examination of the legislative history strongly bolsters what the structure of the statute and canon of *noscitur a sociis* indicate. Congress intended the exception to protect the USPS from liability only for injuries stemming from loss, damage, or delay of the mail itself. At several points, leading defenders of the bill stressed that the Act, even with the exception, would provide an avenue of relief for individuals injured by postal vehicles. For instance, in a hearing before a Subcommittee of the House Committee on Claims, Assistant Attorney General Charles Rugg stated that: "I suppose that the bulk of the cases we are trying to take care of are personal-injury cases caused by automobiles of the post-office service. There are no exceptions covering those." *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 17 (1932)

(statement of Hon. Charles B. Rugg, Assistant Attorney General of the United States, Court of Claims Division). Similarly, Representative Emmanuel Celler argued that the FTCA was needed to provide a remedy if a small child were struck by a mail truck. H.R. REP. NO. 69-667, at 13 (1926). The construction advanced in the court below therefore undercuts the very purpose animating enactment of the FTCA. Congress intended the Act to apply to slip and fall cases in post office buildings, traffic accidents involving postal vehicles, and other physical injuries due to the negligence of postal officials.

Moreover, the legislative history further illuminates why Congress distinguished claims arising from damage to the mail from other torts committed by postal service employees. The House Report accompanying Senate Bill 1912 in 1926 asserted that, "The purpose of [the exception] is to exclude from consideration under this bill certain classes of claims for which satisfactory relief is available under existing law." H. R. REP. No. 69-667, at 4. O.R. McGuire, counsel to the Comptroller General of the United States and Special Assistant to the Attorney General of the United States, in responding to a representative's concerns that the exceptions to liability were overbroad, pointed out that Congress retained immunity for "loss, miscarriage, or negligent transmission" of the mails in part because "[p]rotection may be secured by insurance and registration of [postal matter]." *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 18 (1932). The customer was in a better position than the postal service to assess the importance of the mail and to take steps accordingly. Customers, in other words, could self-insure to protect their mail against postal service negligence. On the other hand, individuals cannot self-insure for the possibility of physical injuries inflicted by the negligence of postal service employees without insuring at the same time for injuries suffered due to the negligence of other tortfeasors, a

much less efficient (not to mention fair) option. And there simply is no mechanism comparable to the registration of the mail to minimize the *risk* of personal injury.[6]

The legislative history reveals that Congress intended the exception to protect the USPS from claims stemming from damage to postal matter, not injuries to private individuals. As Alexander Holtzoff, Special Assistant to the Attorney General summarized, "Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It 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." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 38 (1940) (emphasis added). Thus, the legislative history suggests that the term "claim" in the postal matter exception refers only to those arising out of loss, damage, or delay of the mail itself – as stressed by Special Assistant Holtzoff – and not physical injuries suffered by individuals. There is no evidence in the legislative history suggesting the Congress intended the exception to shield the USPS from physical injuries arising in mail delivery.

II. THE COURT BELOW ERRED IN RELYING ON THE CANON THAT WAIVERS OF SOVEREIGN IMMUNITY ARE TO BE STRICTLY CONSTRUED

[6] Indeed, the Senate Report accompanying the Act later echoed this testimony in explaining that the exception covered "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. REP. NO. 79-1400, at 33 (1946).

Nor can the construction of the court below be salvaged by resort to the canon that waivers of sovereign immunity are to be construed strictly. The court stated that "any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government." *Dolan v. U.S. Postal Serv.*, 377 F.3d 285, 287-88 (3d Cir. 2004).

This Court, however, has twice rejected the salience of that canon in construing exceptions to the FTCA. In *Smith v. United States*, 507 U.S. 197, 198 (1993), the Court addressed the question whether the waiver of sovereign immunity contained in the statute applied to cases arising out of injuries in Antarctica. In analyzing the breadth of the exception to the Act's broad waiver of immunity for "any claim arising in a foreign country," the Court did not use the "strict construction" rule. *See id*. at 203. Rather, the Court adhered to the rule that "we should not take it upon ourselves to extend the waiver . . . [n]either, however, should assume the authority to narrow the waiver that Congress intended." *Id.* Once it was clear that Congress had intended to waive a category of claims or type of relief, then no further strict construction was appropriate.

Moreover, in *Kosak*, this Court reiterated that the canon of strictly construing waivers of immunity is not applicable once the parameters of the broad waiver have been established. 465 U.S. at 848, 854. As the Court explained, "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Id*. Thus, "[w]e think the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Id*.

Outside the FTCA, this Court has similarly eschewed reliance on the canon of strictly construing waivers of

immunity once the broad parameters of the waiver have been established. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 91-92 (1990), the question raised was whether the common law rule of equitable tolling applied in employment discrimination cases for which the government had waived its immunity pursuant to Title VII. This point was not specifically addressed in the statute, but rather than holding that equitable tolling was inapplicable because it was not unambiguously provided for in the statute, the Court stated that

> [o]nce Congress has made such a waiver [of sovereign immunity] we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

Id. at 95.[7]

The court below thus erred in relying on the canon of strictly construing waivers of immunity in reaching its expansive interpretation of the exception. As under *Smith*, *Kosak*, and *Irwin*, conventional tools of statutory construction should apply to resolve the questions arising in interpreting the interstitial questions at stake once the basic terms of the waiver of immunity have been understood.

To be sure, this Court has invoked the canon when it

---

[7] The same has been held true by this Court with respect to other waivers of USPS's immunity. *See Loeffler v. Frank*, 486 U.S. 549, 565 (1988) (permitting award of prejudgment interest after concluding that the USPS's immunity under Title VII had been waived).

remains unclear whether Congress intended to waive the government's immunity for particular types of relief or for a broad category of claims. In such cases, this Court has required a clear, unambiguous statement by Congress that the statute in question is intended to waive the United States' immunity.

In *Lane v. Pena*, 518 U.S. 187 (1996), for example, upon which the court below relied, this Court stated that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Id.* at 192. In that case, the Court addressed the question whether Section 504(a) of the Rehabilitation Act of 1973 provided monetary damages for individuals alleging that a government agency discriminated against them because of a disability. *Id*. at 189. The Court stated that, in order for the government to be liable for monetary damages, as opposed to equitable relief, "the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 192. Because the Court did not find such an unambiguous statement with respect to that type of relief, it held that Congress had not waived the United States' sovereign immunity to that form of relief. *Id.* at 200.

Similarly, the Court stated in *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992), that "the Government's consent to be sued 'must be construed strictly in favor of the sovereign.'" *Id.*at 34. The question was whether Section 106(c) of the Bankruptcy Code allowed a bankruptcy court to issue a judgment for monetary relief against the Internal Revenue Service. *Id*. at 31. The Court found that, although Section106(c) "waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims." *Id.* at 34. As in *Lane*, the Court demanded a clear waiver before determining that Congress intended to subject

the government to a new category of relief.[8]

Once a court has determined whether a category of claims or relief is available, however, then the canon of strictly construing waivers of immunity loses its force. Otherwise, the canon would become nothing more than a judicially created advantage for the government in litigation.[9] Indeed, in *Nordic Village* itself, the Court recognized that the canon had no place to play in construing the exceptions to the FTCA: "We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act." 503 U.S. at 34.

Thus, the court below erred by invoking the canon of strict construction of waivers to support its reading of the exception. As in *Irwin*, *Kosak*, and *Smith*, this Court should approach the interpretative task without using a tiebreaker on the government's behalf. The wording, structure, and underlying congressional intent of the postal matter exception convincingly support petitioner's argument that claims of physical injury do not lie within the exception.

---

[8] *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992), provides an example of the Court using its strict construction rule to analyze whether Congress has waived sovereign immunity with respect to a class of claims. In this case, the Court considered whether the United States had waived its liability from civil fines of a punitive nature imposed by a state for violations of the Clean Water Act or the Resource Conservation and Recovery Act of 1976. The Court found that neither statute contained an unambiguous waiver of sovereign immunity towards the particular type of claim - a claim for punitive damages brought by a state against a federal agency - that Ohio sought to bring. *Id.* at 628.

[9] As this Court counseled in *Ardestani v. INS*, 502 U.S. 129, 137 (1991), "once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'"

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

HAROLD J. KRENT
Counsel of Record
CHICAGO-KENT COLLEGE OF LAW
565 W. Adams Street
Chicago, IL 60661
(312) 906-5010

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036

Counsel for Amici Curiae

July 14, 2005