

AMERICAN BAR ASSOCIATION**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
CENTER FOR DIVERSITY, EQUITY AND INCLUSION
COMMISSION ON DISABILITY RIGHTS****TORT TRIAL AND INSURANCE PRACTICE SECTION
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress to amend the Federal
2 Tort Claims Act's postal exception, codified at 28 U.S.C. § 2680(b), to provide that the
3 exception does not bar claims arising out of the intentional withholding, refusal to deliver,
4 destruction, or other deliberate mishandling of letters or postal matter by an employee of
5 the United States Postal Service acting within the scope of employment, where the
6 claimant alleges that the conduct was motivated by intentional discriminatory animus
7 based on race, color, religion, sex (including sexual orientation and gender identity),
8 national origin, age, disability, political affiliation, or genetic information, and not the result
9 of negligence or the ordinary operations of the Postal Service.

REPORT

I. Introduction and Summary of the Resolution

This Resolution urges Congress to amend the Federal Tort Claims Act's postal exception to permit tort claims against the United States when employees of the United States Postal Service intentionally withhold, refuse to deliver, destroy, or otherwise deliberately mishandle mail, particularly when such conduct is motivated by discriminatory animus based on a status protected under federal anti-discrimination law. This Resolution is a direct response to the Supreme Court's decision in *United States Postal Service v. Konan*, decided on February 24, 2026, in which a closely divided Court held that the postal exception bars all claims arising from the nondelivery of mail, regardless of whether the nondelivery was negligent or intentional.¹

The *Konan* decision immunizes the Postal Service from tort liability even when its employees deliberately and maliciously refuse to deliver mail based on the race, religion, or other protected status of the intended recipient. The decision leaves such victims without a meaningful remedy under the FTCA, and the Westfall Act simultaneously bars personal tort suits against the individual employees.² This Resolution proposes a narrowly tailored amendment that would restore the FTCA's waiver of sovereign immunity for claims involving intentional or discriminatory mishandling of mail while preserving the Postal Service's immunity for routine operational failures.

II. The *Konan* Decision and Its Consequences

The facts of *Konan* are as stark as the legal question it presented. Lebene Konan, a Black landlord in Euless, Texas, alleged that Postal Service employees intentionally withheld mail from two rental properties she owned for approximately two years. Konan alleged that the employees refused to deliver mail because they objected to the fact that a Black person owned the properties and leased rooms to white tenants.³ Konan brought state-law tort claims against the United States under the FTCA, including nuisance, tortious interference with business relations, and intentional infliction of emotional distress.

The district court dismissed the claims, holding that they fell within the postal exception at 28 U.S.C. § 2680(b), which bars “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”⁴ The Fifth Circuit reversed, reasoning that the terms “loss,” “miscarriage,” and “negligent transmission” do not encompass the intentional act of not delivering mail at all.⁵ The Supreme Court granted certiorari to resolve a circuit split and, in a five-to-four decision authored by Justice Thomas, reversed

¹ *United States Postal Serv. v. Konan*, ___ U.S. ___, 146 S.Ct. 736 (2026).

² 28 U.S.C. § 2679(b)(1); see Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563.

³ *Konan v. United States Postal Serv.*, 652 F.Supp.3d 721, 725 (N.D. Tex. 2023).

⁴ 28 U.S.C. § 2680(b).

⁵ *Konan v. United States Postal Serv.*, 96 F.4th 799 (5th Cir. 2024), vacated and remanded, 146 S.Ct.736 (2026).

the Fifth Circuit and held that the postal exception bars claims arising from the intentional nondelivery of mail.⁶

The majority reasoned that the ordinary meanings of “miscarriage” and “loss” at the time of the FTCA’s enactment in 1946 encompassed any failure of mail to reach its intended destination, regardless of the postal employee’s intent.⁷ Justice Sotomayor, joined by Justices Kagan, Gorsuch, and Jackson, dissented sharply, arguing that the majority’s reading “transforms, rather than honors, the exception Congress enacted” and that Congress intended the postal exception to preserve immunity for routine operational mishaps, not for deliberate misconduct.⁸ The dissent emphasized that the FTCA’s other existing safeguards—including the discretionary function exception, the prohibition on punitive damages, the administrative exhaustion requirement, and the bench-trial requirement—would adequately protect the Postal Service from frivolous litigation without extending blanket immunity to intentional and discriminatory conduct.⁹

III. The Remedial Vacuum Created by *Konan*

The practical consequence of *Konan* is a complete remedial vacuum for victims of intentional and discriminatory mail withholding. The FTCA’s postal exception, as interpreted by the Court, bars tort claims against the United States. The Westfall Act bars personal tort claims against the individual postal employees.¹⁰ While criminal statutes prohibit the theft and obstruction of mail by postal employees,¹¹ criminal prosecution is within the discretion of the Department of Justice and provides no private remedy or compensation to the victim. And while federal civil rights statutes provide a theoretical basis for claims of discriminatory conduct, *Konan* herself was unable to sustain an equal protection claim because the Fifth Circuit found her allegations insufficient to demonstrate that similarly situated white property owners were treated differently. The result is that a landlord who alleges a years-long racially motivated campaign to withhold her mail—causing real economic harm through the loss of tenants and business—has no viable path to compensation.

This outcome is especially troubling in light of the FTCA’s foundational purpose. Congress enacted the FTCA in 1946 to ensure that persons injured by the tortious conduct of federal employees would have a remedy against the United States, on the theory that the government should be liable “in the same manner and to the same extent as a private individual under like circumstances.”¹² No private mail carrier could intentionally refuse to

⁶ *Konan*, 146 S.Ct. at 746.

⁷ *Id.* at 742–43.

⁸ *Konan*, 607 U.S. at 746–47 (Sotomayor, J., dissenting, joined by Kagan, Gorsuch, and Jackson, JJ.).

⁹ See *Konan*, 607 U.S. at 753–54 (Sotomayor, J., dissenting) (“Contrary to the majority’s suggestion otherwise, adhering to the text Congress enacted would not flood the Government or courts with frivolous lawsuits.”).

¹⁰ See 28 U.S.C. § 2679(b)(1).

¹¹ See 18 U.S.C. § 1708 (criminalizing theft or obstruction of mail by postal employees); 18 U.S.C. § 1702 (criminalizing obstruction of correspondence).

¹² 28 U.S.C. § 2674.

deliver a customer's mail because of the customer's race and escape tort liability. The *Konan* decision permits the Postal Service to do precisely that.

IV. The Need for a Narrowly Tailored Amendment

This Resolution does not propose to eliminate the postal exception entirely. The postal exception serves a legitimate purpose: it shields the Postal Service from the enormous volume of litigation that would inevitably arise if the government could be sued for every lost, delayed, or misdirected piece of mail in a system that delivers over 300 million items per day.¹³ Routine negligence in mail handling—a letter that goes to the wrong address, a package that is delayed in transit, a catalog that is damaged in processing—is an inherent and unavoidable feature of large-scale postal operations. The postal exception appropriately shields the government from tort liability for these routine operational failures.¹⁴

What the postal exception should not do—and what Congress almost certainly did not intend it to do in 1946—is shield the Postal Service from liability when its employees deliberately refuse to deliver a person's mail because of that person's race, religion, sex, national origin, disability, age, or political affiliation. The distinction between negligent operational failures and intentional discriminatory conduct is both principled and administrable. The proposed amendment draws this line clearly: the postal exception would continue to bar claims arising out of negligent loss, miscarriage, or negligent transmission of mail in the ordinary course of operations, but would not bar claims where the claimant alleges that the conduct was intentional and motivated by discriminatory animus rather than the product of negligence.

The second Resolved clause expressly preserves the postal exception for negligent conduct, ensuring that the Postal Service retains its immunity for the routine operational failures that the exception was designed to address. This dual structure mirrors the approach Congress took in 1974 when it amended § 2680(h) to restore the FTCA waiver for certain intentional torts committed by law enforcement officers while retaining the exception for other enumerated torts.¹⁵

V. The Civil Rights Dimension

The facts of *Konan* illustrate why this issue belongs squarely within the ABA's civil rights mandate. The plaintiff alleged that Postal Service employees refused to deliver her mail because she is Black. If these allegations are true, the conduct violates not only general principles of tort law but also the fundamental guarantee of equal treatment that lies at the heart of federal anti-discrimination law.

¹³ See *Konan*, 607 U.S. at 740 (noting that the Postal Service's more than 600,000 employees delivered more than 112 billion pieces of mail in 2024).

¹⁴ See generally *Dolan v. United States Postal Serv.*, 546 U.S. 481, 489 (2006) (describing the postal exception as addressing "harms" "of the sort primarily identified with the Postal Service's function of transporting mail throughout the United States").

¹⁵ See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) to restore the FTCA waiver for six intentional torts committed by law enforcement officers).

The proposed amendment specifically enumerates the protected statuses under existing federal anti-discrimination law—race, color, religion, sex (including sexual orientation and gender identity), national origin, age, disability, political affiliation, and genetic information—to make clear that the FTCA’s waiver of sovereign immunity extends to discriminatory conduct by postal employees that is motivated by animus toward any of these characteristics. This enumeration ties the amendment to well-established bodies of anti-discrimination jurisprudence and ensures that courts have a familiar framework for evaluating whether the alleged conduct was discriminatory.

VI. Relationship to Existing ABA Policy

This Resolution is consistent with longstanding ABA policy supporting government accountability, the rule of law, and the elimination of discrimination in all its forms. The ABA has previously urged legislative action to overturn Supreme Court decisions that unduly restrict the availability of remedies for employment discrimination, including its August 2007 endorsement of the Lilly Ledbetter Fair Pay Act. In August 2022, the House adopted Resolution 22A507, urging legislation remedying longstanding effects of structural racism, and Resolution 22A503, urging the establishment and expansion of Offices of Equity. In February 2025, the House adopted Resolution 25M402, opposing the investigation or prosecution of bar associations for activities protected by the First Amendment, including advocacy for diversity, equity, and inclusion. Each of these policies reflects the ABA’s commitment to combating racial discrimination and ensuring that governmental institutions are held to standards of accountability consistent with the rule of law. This Resolution fills a gap in existing policy by proposing a narrowly tailored amendment to the FTCA’s postal exception in direct response to the Supreme Court’s decision in *United States Postal Service v. Konan*, 146 S.Ct. 736 (2026), which immunized the Postal Service from tort liability even when its employees allegedly withheld mail from a Black landlord because of her race. Adoption of this Resolution would not reverse or conflict with any existing Association policy.

This Resolution advances at least three of the ABA’s four stated goals.¹⁶ It advances the goal of eliminating bias and enhancing diversity by ensuring that postal employees cannot engage in racially or otherwise discriminatorily motivated misconduct without the government being held accountable. It advances the goal of advancing the rule of law by closing a remedial gap that permits the government to escape liability for conduct that would be tortious if committed by any private person. And it advances the goal of improving the profession by promoting the availability of meaningful legal remedies in an area where the current law leaves injured parties without any path to compensation.

VII. Anticipated Objections

The primary objection to this amendment will be the concern, voiced by the government in *Konan*, that permitting tort claims for intentional mail withholding will open the floodgates to litigation by persons who believe their mail was deliberately withheld when

¹⁶ See ABA, *ABA Mission and Goals*, https://www.americanbar.org/about_the_aba/aba-mission-goals/.

it was simply lost or delayed. This concern is addressed by the structure of the amendment, which requires the claimant to allege intentional conduct or discriminatory animus—a significantly higher pleading and proof burden than negligence. The FTCA’s existing procedural safeguards provide additional protection: the administrative exhaustion requirement ensures that the Postal Service has the first opportunity to investigate and resolve claims; the prohibition on punitive damages limits the government’s financial exposure; and the bench-trial requirement ensures that claims are adjudicated by federal judges rather than juries. As Justice Sotomayor observed in dissent, these safeguards mean that “adhering to the text Congress enacted would not flood the Government or courts with frivolous lawsuits.”¹⁷

A second potential objection is that the existing criminal statutes prohibiting mail theft and obstruction provide adequate deterrence and accountability. Criminal prosecution, however, is entirely within the discretion of the Department of Justice and provides no private remedy or compensation to the victim. A person whose mail has been deliberately withheld for two years, resulting in the loss of tenants and substantial economic harm, deserves a civil remedy regardless of whether the government chooses to prosecute the responsible employee.

VIII. Conclusion

The Supreme Court’s decision in *United States Postal Service v. Konan* has immunized the Postal Service from tort liability for the intentional and discriminatory withholding of mail, creating a remedial vacuum that is inconsistent with the FTCA’s foundational purpose and with fundamental principles of government accountability and civil rights. Congress should act to amend the postal exception to restore the availability of tort claims for intentional and discriminatory conduct by postal employees while preserving the Postal Service’s immunity for the routine operational failures inherent in large-scale mail delivery. The American Bar Association should urge Congress to enact this narrowly tailored amendment.

Respectfully submitted,

Mario Sullivan, Chair
Section of Civil Rights and Social Justice

August 2026

¹⁷ *Konan*, 146 S.Ct. at 753-54 (Sotomayor, J., dissenting).

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Mario A. Sullivan, Chair

1. Summary of the Resolution(s).

This Resolution urges Congress to amend the FTCA's postal exception at 28 U.S.C. § 2680(b) to provide that the exception does not bar claims arising out of the intentional withholding, refusal to deliver, destruction, or other deliberate mishandling of letters or postal matter by Postal Service employees, where the claimant alleges that the conduct was motivated by discriminatory animus based on race, color, religion, sex, national origin, age, disability, political affiliation, or genetic information, and not the result of negligence. The Resolution preserves the postal exception for claims arising out of negligent loss, miscarriage, or negligent transmission of mail in the ordinary course of operations. The Resolution responds directly to the Supreme Court's five-to-four decision in *United States Postal Service v. Konan*, 146 S.Ct. 736 (2026), which held that the postal exception bars all claims arising from the nondelivery of mail regardless of whether the nondelivery was negligent or intentional.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

(II) Improve our Profession: The Resolution promotes the availability of meaningful legal remedies for intentional and discriminatory conduct by postal employees, an area in which the current law leaves injured parties without any viable path to compensation.

(III) Eliminate Bias and Enhance Diversity: The Resolution ensures that postal employees cannot engage in racially or otherwise discriminatorily motivated misconduct—such as the deliberate withholding of mail from a Black landlord alleged in *Konan*—without the government being held accountable.

(IV) Advance the Rule of Law: The Resolution closes a remedial gap created by the *Konan* decision that permits the government to escape liability for conduct that would be tortious if committed by any private person, consistent with the FTCA's foundational principle of holding the government to the same standard as a private individual

3. Approval by Submitting Entity. The Section of Civil Rights and Social Justice approved sponsorship of this Resolution on April 6, 2026.

4. Has this or a similar resolution been submitted to the House or Board previously?
No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has consistently supported the principle that the federal government should be held accountable for the wrongful conduct of its employees and that victims of governmental misconduct should have access to meaningful legal remedies. The ABA has previously urged legislative action to overturn Supreme Court decisions that unduly restrict the availability of remedies for employment discrimination, including its August 2007 endorsement of the Lilly Ledbetter Fair Pay Act. In August 2022, the House adopted Resolution 22A507, urging legislation remedying longstanding effects of structural racism, and Resolution 22A503, urging establishment and expansion of Offices of Equity. In February 2025, the House adopted Resolution 25M402, opposing the investigation or prosecution of bar associations for activities protected by the First Amendment, including advocacy for diversity, equity, and inclusion. Each of these policies reflects the ABA's commitment to combating racial discrimination and ensuring institutional accountability.

This Resolution responds directly to the Supreme Court's five-to-four decision in *United States Postal Service v. Konan*, 146 S.Ct. 736 (2026), which immunized the Postal Service from tort liability even when its employees allegedly withheld mail from a Black landlord because of her race. The Resolution fills a gap in existing policy by proposing a narrowly tailored amendment to the FTCA's postal exception that would restore the availability of tort claims for intentional and discriminatory mail withholding while preserving the Postal Service's immunity for routine operational failures. Adoption of this Resolution would not reverse or conflict with any existing Association policy.

6. If this is a late report, what urgency exists which requires action at this meeting of the House? No.

7. Status of Legislation.
None.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If adopted, the Section of Civil Rights and Social Justice will work with the ABA Governmental Affairs Office to transmit the policy to the relevant congressional committees. The Section will seek opportunities to present the policy in congressional testimony, to include the policy in amicus briefs, and to coordinate with civil rights organizations, consumer advocacy groups, and postal worker unions in support of legislation consistent with the Resolution.

9. Cost to the Association. (Both direct and indirect costs)
None.

10. Disclosure of Interest. (If applicable)

N/A.

11. Referrals.

Business Law Section
Center for Professional Responsibility
Coalition on Racial and Ethnic Justice
Commission on Domestic and Sexual Violence
Commission on Hispanic Legal Rights & Responsibilities
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Criminal Justice Section
Cybersecurity Legal Task Force
Diversity, Equity, and Inclusion Advisory Council
Division for Public Education
Government and Public Lawyers Sector Lawyers Division
Hispanic National Bar Association
International Law Section
Judicial Division
Law Student Division
Real Property, Probate and Trust Law Section
Science and Technology Law Section
Section of Litigation
Section of Administrative Law and Regulatory Practice
Section of Environment, Energy, and Resources
Section of State, Local and Tribal Government Law
Section of Labor and Employment Law
Senior Lawyers Division
Solo, Small Firm and General Practice Law Division
Tort Trial and Insurance Practice Section
Young Lawyers Division
National Asian Pacific American Bar Association
National LGBTQ+ Bar Association
National Native American Bar Association
National Bar Association

12. Certification of Compliance. All resolutions and reports submitted for consideration by the House of Delegates must be original work, with proper cites and the ability to use the content contained therein. All cites in the resolution and report must be checked by the submitting person or entity for accuracy prior to submission. Finally, if material from another source is cited in a resolution or report, there must be both proper attribution and the legal ability to use the information. Please name the person who verifies that these requirements have been met for the resolution and report submitted.

Jordan D. Howlette

13. Name and Contact Information (Prior to the Meeting.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution urges Congress to amend the FTCA's postal exception at 28 U.S.C. § 2680(b) to provide that the exception does not bar claims arising out of the intentional withholding, refusal to deliver, destruction, or other deliberate mishandling of letters or postal matter by Postal Service employees, where the claimant alleges that the conduct was motivated by discriminatory animus based on race, color, religion, sex, national origin, age, disability, political affiliation, or genetic information, and not the result of negligence. The Resolution preserves the postal exception for claims arising out of negligent loss, miscarriage, or negligent transmission of mail in the ordinary course of operations. The Resolution responds directly to the Supreme Court's five-to-four decision in *United States Postal Service v. Konan*, 146 S.Ct. 736 (2026), which held that the postal exception bars all claims arising from the nondelivery of mail regardless of whether the nondelivery was negligent or intentional.

2. Summary of the issue that the resolution addresses.

On February 24, 2026, the Supreme Court held in *United States Postal Service v. Konan* that the FTCA's postal exception bars all tort claims arising from the nondelivery of mail, regardless of whether the nondelivery was negligent or intentional. The case involved a Black landlord in Texas who alleged that Postal Service employees deliberately withheld her mail for two years because of her race. The five-to-four decision immunizes the Postal Service from tort liability even for intentional and discriminatory mail withholding, and the Westfall Act simultaneously bars personal tort suits against the individual employees. The result is a complete remedial vacuum: victims of intentional and discriminatory conduct by postal employees have no viable path to compensation under the FTCA, no ability to sue the individual employee, and no private right of action under the criminal mail obstruction statutes.

3. Please explain how the proposed policy position will address the issue.

The proposed amendment would carve out from the postal exception claims alleging intentional withholding, refusal to deliver, destruction, or other deliberate mishandling of mail, with a particular focus on conduct motivated by discriminatory animus based on federally protected statuses. This would restore the FTCA's waiver of sovereign immunity for such claims while expressly preserving the postal exception for negligent operational failures. The amendment mirrors the approach Congress took in 1974 when it carved out from § 2680(h) certain intentional torts committed by law enforcement officers. The FTCA's existing procedural safeguards—administrative exhaustion, prohibition on punitive damages, bench trials—would continue to protect the Postal Service from frivolous claims.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None.