No.

In the Supreme Court of the United States

KEVIN ABBEY, ET AL.
PETITIONERS,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE NAVY,
RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are active and former San Francisco Police Department employees and their family members. They suffer from cancer and numerous ailments caused by exposure to toxic and radioactive materials the government knowingly released at a Naval shipyard in San Francisco Bay. Petitioners sued the government for negligence. In the decision below, the Ninth Circuit held that all the Petitioners lack subject matter jurisdiction for all their claims under the Federal Tort Claims Act (FTCA), which waives the federal government's sovereign immunity from civil tort actions but excludes from that waiver claims "arising out of" various intentional torts including "misrepresentation." 28 U.S.C. §§ 1346(b)(1), 2680(h).

The question presented is:

Whether Petitioners' negligence claims "aris[e] out of … misrepresentation," and thus are barred by section 2680(h) of the FTCA, even though Petitioners did not personally rely on an alleged misrepresentation.

PARTIES TO THE PROCEEDING

Petitioners are current and former employees of the San Francisco Police Department, along with their family members, who claim damages due to exposure to hazardous substances at Hunters Point Naval Shipyard. Petitioners were appellants in the court of appeals and plaintiffs in the district court. Petitioners are: Kevin M. Abbey; Lorenzo None Adamson; Taryn Aguilera; William Ahern; Gary Aicardo; Arnaldo A. Aleman; Joseph K. Allegro; Nicholas M. Allen; Richard G. Alves; Debra Anderson; Larryett Anderson; Malcolm Anderson; Tim Anderson; Robert Armanino; Victor Arrebollo; Wade Bailey; Rick Bailon; E. R. Balinton; Ronald Banta; John M. Barcojo; Teresa Barrett; Joseph Barretta; David Batchelder; Eric Batchelder; James Batchelor; Melvin S. Bautista; Wendy Bear; Michael Becker; Jerrell Bell; Stephen Benzinger; Donald Bickel; John V. Bisordi; Richard B. Bodisco; Robert Bohanan; Robert Bonnet; James Bosch; Lance Bosshard; Steve Bosshard; Geoff Bowker; Kirk Bozin; Christopher Breen; Barbara Brewster; Kathryn Brown; Philip D. Brown; Willa Brown; Michael J. Browne; Kevin P. Brugaletta; William Brunicardi; Alexandria Brunner-Jones; Carl Bryant, Sr.; Thomas Buckley; Bruce Buerstatte; Michael D. Burkley; Patricia Burley; Mary Burns; Peter Busalacchi; Stanley Buscovich; Robert W. Byrne; Anthony Calasanz; Edgar Callejas; Rolando Canales; Brian P. Canedo; Tim Cantillon (Vincent Cantillon, deceased); Oscar Carcelen; Mel Cardenas; Joseph Carlin; Annette M. Carrier; Croce Casciato; Louis A. Cassanego; Matthew Castagnola; Adriano Castro; Dominic M. Celaya; John L. Centurioni; Barrett Chan; Lawrence Chan; Nathan Chan; Robert B. Chapman; Bonnie Cheng; John R. Chestnut; Kevin Kye Chin; Samuel A. Christ; Don Ciardella; Maria Hermina Ciriaco (formerly Swann); Michael Cleary; William J. Coggan; Davin L.

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Swendsen; Paul Swiatko; Glenn Sylvester; John Syme; Stephen A. Tacchini; Timothy Gee Tang; Dean Taylor; Carl Tennenbaum; Melvin Thornton; Alejandro Tiffer; Stephen Tittel; Roland Tolosa; Lamar Toney; Albert Tong; Jonathan S. Tong; Michael Toomey; Michael Toropovsky; Robert Totah; Robert Toy; Victor Tsang; Ricardo Valdez; Matthew Valmonte; Albert G. Van Buskirk; Richard Van Koll; John S. Vankoll; Johnny Velasquez; Shawn Wallace; Thomas P. Walsh; Christalyn Washing on; Marty Way; Trenia Wearing; Graig Wells; Michael Wells; Kelly Wesley; Kevin Whalen; Erik Whitney; Angela Wilhelm; Damon Williams, Jr.; Frances Williams; Mark Williams; Yulanda D. Williams; Dewayne Wilson; Jason Wilson; Kimberly Wong; Kurtis A. Wong; Bryan Woo; Kelvin Woo; Edward J. Wynkoop; Quentin Yaranon; Gordon D. Yee; Julie A. Yee; Warren K. Yee; Eugene Yoshii; Roderick Young; Edward Yu; Joseph A. Zamagni, Jr.; Joseph A. Zamagni Sr.; Robert Ziegler; Steven Zukor; Michael Zurcher.

Respondents, United States of America and United States Department of the Navy, were appellees in the court of appeals and defendants in the district court.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Abbey v. United States*, 23-15170 (9th Cir. Aug. 20, 2024) (affirming district court's dismissal of action for lack of subject matter jurisdiction)
- *Abbey v. United States*, 3:20-cv-06443 (N.D. Cal. Jan. 17, 2023) (dismissing action for lack of subject matter jurisdiction)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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

PETITION FOR A WRIT OF CERTIORARI

Petitioners Kevin Abbey et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at 112 F.4th 1141 (9th Cir. 2024). Pet.App.1a-30a. The opinion of the district court is unreported but available at 2023 WL 218960 (N.D. Cal. Jan. 17, 2023). Pet.App.31a-41a.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b)(1) provides:

> Subject to the provisions of chapter 171 of this title, the district courts … shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(h) provides in relevant part that the provisions of section 1346(b) "shall not apply to":

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights….

28 U.S.C. §§ 1346 and 2680 are reproduced in full, *infra* Pet.App.42a-47a.

STATEMENT

This case presents an exceptionally important, outcome-determinative question concerning the scope of the

Federal Tort Claims Act's (FTCA) misrepresentation exception. The FTCA waives the government's sovereign immunity for a range of torts, 28 U.S.C. § 1346(b)(1), but includes an exception for claims against the government "arising out of" several common-law intentional torts, including "misrepresentation," *id.* § 2680(h).

In the decision below, the Ninth Circuit held that the misrepresentation exception bars negligence claims against the government even where the plaintiff did not personally rely on an alleged misrepresentation. Instead, all the government need show is that a government misrepresentation to *someone* is factually at the center of the plaintiff's claim. The Seventh and Eleventh Circuits follow the same rule.

In stark contrast, in the First and Tenth Circuits, the government cannot invoke the misrepresentation exception unless the claim tracks all the "essential element[s]" of common-law misrepresentation, including "reliance by the plaintiff himself upon the false information that has been provided." *Jimenez-Nieves v. United States*, 682 F.2d 1, 4 (1st Cir. 1982) (Breyer, J.); *accord Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 854 (10th Cir. 2005) (citation omitted). That conclusion follows directly from this Court's precedents instructing courts to look to the "traditional and commonly understood definition of the tort" when interpreting the misrepresentation exception. *Jimenez-Nieves*, 682 F.2d at 3-4 (quoting *United States v. Neustadt*, 366 U.S. 696, 706 (1961)). Where the plaintiff did not rely on the government's misrepresentation, the misrepresentation exception does not apply and the claim can proceed.

That clear circuit split was plainly outcome determinative here. Petitioners are active and former San Fran-

cisco police officers who were poisoned by radioactive nuclear waste that the federal government deposited on Navy land subsequently leased to the City of San Francisco for use by the San Francisco Police Department (SFPD). Petitioners bring a classic negligence claim: the government failed to properly supervise and conduct remediation activities prior to leasing the property to the City. But according to the Ninth Circuit, because the government also incorrectly told *the City* that the leased site was safe, the misrepresentation exception bars Petitioners' lawsuit in its entirety—even their claims that do not depend on proving a misrepresentation. In the First and Tenth Circuits, by contrast, this case would be on to discovery and trial because no misrepresentation was made *to the plaintiffs*.

The question presented is manifestly important. Tort claims under the FTCA are some of the most common claims asserted against the federal government year after year, allowing victims of government wrongdoing like Petitioners to recover for their injuries. Yet under the Ninth Circuit's rule, countless mine-run negligence claims—as well as high-stakes environmental tort actions, like this case—could be thrown out under the misrepresentation exception. On one side of the split, to get a case tossed for lack of subject-matter jurisdiction, the government need only identify a false or misleading statement to *someone* in the fact pattern, even one that was never made to the plaintiff and thus could not sustain a common-law misrepresentation claim.

As then-Judge Breyer explained in rejecting that illogical rule, disregarding the common-law reliance requirement would gut the FTCA and lead to "bizarre" results. *Jimenez-Nieves*, 682 F.2d at 4. The government could use its own alleged misconduct to defeat an action

where the plaintiff need not—and cannot—satisfy the elements of a misrepresentation claim. Where the government would be liable for negligence, allegations of the government's own misrepresentations should not save it.

Due to this split, plaintiffs who could obtain meaningful relief in at least two circuits now find themselves without a remedy in at least three others. Only this Court can resolve that intractable, acknowledged conflict, and this case is an ideal vehicle for doing so.

A. Statutory Background

In 1946, Congress enacted the FTCA "to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards v. United States*, 369 U.S. 1, 6 (1962). The Act was "not an isolated and spontaneous flash of congressional generosity." *Feres v. United States*, 340 U.S. 135, 139 (1950). Rather, it "mark[ed] the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Id.* "[A]fter nearly thirty years of congressional consideration," the FTCA "was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

The FTCA was "designed to build upon" existing common law principles. *Richards*, 369 U.S. at 7. In drafting the Act, "[u]ppermost in the collective mind of Congress were the ordinary common-law torts." *Dalehite*, 346 U.S. at 28. The Act therefore allows plaintiffs to sue the federal government "under circumstances where the United States, if a private person, would be liable to the claimant

in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

Congress paired the FTCA's "broad waiver of sovereign immunity" with limited exceptions. *Millbrook v. United States*, 569 U.S. 50, 52 (2013); *see also* Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 842, 845-46. The relevant exception here, often referred to as the "intentional tort exception," maintains the government's immunity from claims "arising out of" certain common-law torts, specifically "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (emphasis added).[1]

In *United States v. Neustadt*, 366 U.S. 696 (1961), the Court explained that determining the proper scope of section 2680(h)'s exceptions requires courts to consider "the traditional and commonly understood legal definition of the tort" in question. *Id.* at 706. After reviewing sources illuminating the elements of the common-law tort of negligent misrepresentation that Congress would have "had in mind" when it wrote the FTCA, including the 1938 Restatement of Torts and the 1941 edition of Prosser on Torts, the Court held that section 2680(h) "comprehends claims arising out of negligent, as well as willful, misrepresentation." *Id.* at 702, 706, 707 & n.16.

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[1] As the Court has explained, describing section 2680(h) as an intentional tort exception "is not entirely accurate," because the exception "does not remove from the FTCA's waiver all intentional torts, *e.g.*, conversion and trespass, and it encompasses certain torts, *e.g.*, misrepresentation, that may arise out of negligent conduct." *Levin v. United States*, 568 U.S. 503, 507 n.1 (2013).

And in *Block v. Neal*, 460 U.S. 289 (1983), the Court clarified that the exception does not bar FTCA claims that merely involve a misrepresentation but are not "wholly attributable to reliance on" the government's misstatements. *Id.* at 297. In reaching that conclusion, the Court emphasized that "the essence of an action for misrepresentation … is the communication of misinformation on which the recipient relies." *Id.* at 296.

B. Factual and Procedural Background

1. In the wake of World War II, the United States assembled an armada of warships at Bikini Atoll in the Pacific Ocean. But these ships were destined for destruction, not combat. Two atomic bombs, each with a yield of approximately 23 kilotons, were detonated over the doomed target fleets as part of an effort to investigate the effects of nuclear weapons on naval warfare. *See* Alex Wellerstein, *America at the Atomic Crossroads*, NEW YORKER (July 25, 2016), https://tinyurl.com/2rur4nt2. The detonations, known as Operation Crossroads, caused "the world's first nuclear disaster." *Id.*; *see also* Plfs.' Second Am. Compl. ¶ 59, No. 3:20-cv-06443 (N.D. Cal.), ECF No. 88 (SAC). Widespread contamination affected ships, military personnel, and plant and animal life around the test site. *See* Wellerstein, *supra*.

Recognizing the risk of continued, uncontained radiation exposure, the Navy brought the most heavily contaminated ships, containing at least 100 radioactive elements, to the Hunters Point Naval Shipyard in San Francisco. SAC ¶ 63(a). Hunters Point's 965-acre shipyard juts from the southeast of San Francisco into the Bay. SAC ¶ 39. The Navy purchased the shipyard in 1939 and took possession a few days after the attack on Pearl Harbor. SAC ¶¶ 41-42. During the Cold War, the Navy brought large quantities of highly radioactive nuclear weapons debris

from A- and H-bomb tests to the shipyard, and the Naval Defense Radiological Laboratory (NRDL) undertook research and decontamination efforts there. SAC ¶¶ 43, 64; Pet.App.4a-5a. Those efforts included a "radioactive laundry" on the property that would later become the site of Building 606. SAC ¶¶ 5, 113(c).

Over the ensuing decades, hazardous elements leached into the soil and groundwater at Hunters Point. *Overview of the Hunters Point Naval Shipyard Cleanup*, SF.GOV (Aug. 26, 2024), https://tinyurl.com/smvzzzxt. In 1989, the Environmental Protection Agency (EPA) designated Hunters Point Naval Shipyard a "Superfund" site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Pet.App.5a. According to the EPA, Navy activities at the shipyard "contaminated soil, dust, sediments, surface water and groundwater with petroleum fuels, pesticides, heavy metals, polychlorinated biphenyls (PCBs), volatile organic compounds (VOCs) and radionuclides." *Hunters Point Naval Shipyard, San Francisco, CA, Cleanup Activities*, U.S. ENV'T PROT. AGENCY (Oct. 28, 2024), https://tinyurl.com/2sen2mbt. The Navy then became "responsible for the investigation and cleanup of the site" before it could be reused. *Id.* The Navy contracted a third party, Tetra Tech, Inc., to plan and oversee the cleanup. Pet.App.5a.

In 1996, the Navy leased the Building 606 property at Hunters Point—an 89,600 square-foot industrial building with 33,000 square feet of surrounding property—to the City of San Francisco for use by the San Francisco Police Department (SFPD). SAC ¶¶ 82-84. Relying on the Navy's representations that there was no history of any radioactive substances at the Building 606 property and that it could be used without health risks from exposure to

hazardous materials, the City leased Building 606 from the Navy, and the SFPD relocated hundreds of its employees to the contaminated shipyard. SAC ¶¶ 11-15.

2. Petitioners are former and active SFPD employees and their family members. Petitioners are suffering from exposure to multiple hazardous, toxic, and carcinogenic substances at the shipyard. They have been diagnosed with cancer, lung disease, and other adverse medical conditions. SAC ¶¶ 27, 251. Some have tragically passed away. SAC ¶¶ 33, 269-275.

In September 2020, Petitioners sued the United States and the Navy under the FTCA asserting several causes of action. As relevant here, Petitioners allege that the Navy negligently performed its inspection, investigation, and record review, negligently supervised Tetra Tech in its cleanup responsibilities, and misinformed the City about the safety of the site. Although Petitioners brought one claim for negligent misrepresentation, they also brought other claims that have nothing to do with misrepresentation, including several other negligence-based claims as well as claims for public nuisance, loss of consortium, and wrongful death. SAC ¶¶ 256-264, 265-268, 269-275.

The government moved to dismiss Petitioners' claims for lack of subject matter jurisdiction, contending that the claims fell outside the federal government's waiver of sovereign immunity. Pet.App.6a. The district court agreed, finding the claims were barred by the misrepresentation exception to the FTCA under 28 U.S.C. § 2680(h). Pet.App.35a. Petitioners argued that the misrepresentation exception should not apply because they did not personally rely on the Navy's false statements and were instead the "unfortunate and foreseeable victims" of the Navy's misrepresentations to the City. *See* Pet.App.12a.

The district court rejected that argument and held that "the misrepresentation at the heart of the claim need not have been made directly to plaintiffs, and plaintiffs need not have directly relied, in order for the misrepresentation exception to apply and bar the claims." Pet.App.37a. The district court accordingly dismissed Petitioners' complaint with prejudice.

3. The Ninth Circuit affirmed. In the court's view, the "key question" presented by the appeal was "whether the FTCA's misrepresentation exception requires the federal government to have made the alleged misrepresentations directly to the plaintiffs—or if making allegedly false statements to the City or the SFPD is enough to invoke this exception and bar the plaintiffs' claims." Pet.App.4a. The court concluded that Petitioners' claims were barred because they "'arise' out of the Navy's alleged misrepresentations, even if the Navy did not directly make them to the plaintiffs." Pet.App.4a.[2] The court reasoned that the FTCA's "arising out of" language required it to "look beyond the label[]" attached to a claim and consider its "gravamen" or "essence." Pet.App.11a.

In reaching this conclusion, the Ninth Circuit acknowledged that this Court's decisions in *Neustadt* and *Block* direct courts to look to the traditional elements of the common-law cause of action, and that "[u]nder the traditional tort of negligent misrepresentation, detrimental reliance by a plaintiff is an 'essential element' of the claim." Pet.App.12a-13a. But the Ninth Circuit dismissed *Neustadt* and *Block*, reasoning that neither decision had

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[2] The panel also rejected Petitioners' argument that the Navy's duty under CERCLA—to disclose environmental health hazards on federally owned property—implicitly limited or suspended the misrepresentation exception. Pet.App.4a. That issue is not presented here.

"squarely addressed section 2680(h)'s 'arising out of' language." Pet.App.13a. The court also rejected Petitioners' reliance on opinions from the First, Tenth, and Fifth Circuits. The Ninth Circuit conceded that language in those opinions "facially supported" Petitioners' argument that the misrepresentation exception required reliance by the plaintiff. Pet.App.20a. But it found that the cases were distinguishable because they "focuse[d] on the distinction between negligence claims in which the misstatements are collateral to the suit's gravamen and those truly premised on the government's misrepresentations." Pet.App.19a-20a.

REASONS FOR GRANTING THE PETITION

This petition is the ideal vehicle for resolving an acknowledged, growing circuit split over whether the FTCA's misrepresentation exception applies to plaintiffs who were not a party to, and therefore did not rely on, a misleading government communication. Two circuits—the First and Tenth—follow the traditional common-law definition of misrepresentation and require the plaintiff himself to have relied on the misrepresentation. Three circuits—the Seventh, Ninth, and Eleventh—squarely disagree and instead apply the misrepresentation exception even when the plaintiff never relied on a misleading government communication. And the Fifth Circuit has come down on both sides of the issue. Only this Court can provide the definitive answer to this outcome-determinative question.

The question presented is important, recurring, and squarely presented. The Ninth Circuit below dismissed Petitioners' FTCA suit, holding that the misrepresentation exception does not require the plaintiffs' reliance. That overzealous approach ignores the traditional, common-law understanding of negligent misrepresentation

and unduly limits plaintiffs' ability to recover for their injuries under the FTCA. This Court should grant certiorari to restore uniformity to the courts' interpretation of this momentous, frequently-litigated, and rights-creating federal statute.

I. The Circuits Are Divided over Whether the Misrepresentation Exception Requires Plaintiffs' Reliance

The "circuit courts have reached discordant answers" on whether the misrepresentation exception bars claims in cases lacking the essential element of reliance. *See Carter v. United States*, 725 F. Supp. 2d 346, 357 (E.D.N.Y. 2010), *rev'd in part on other grounds*, 494 F. App'x 148 (2d Cir. 2012). Two circuits hold that, for the FTCA's misrepresentation exception to bar a plaintiff's claim, the plaintiff must have relied on the government's misrepresentation. Three circuits hold the opposite, and may apply the misrepresentation exception regardless of whether the plaintiff received or relied on the alleged misrepresentation. And the Fifth Circuit has taken inconsistent positions on the question. Absent this Court's intervention, this split will persist and continue to produce intolerably inconsistent results in FTCA suits—based purely on geography.

1. The First and Tenth Circuits hold that the misrepresentation exception does not bar FTCA claims unless the plaintiff relied on the government's misrepresentation.

The First Circuit starts from the well-established principle that courts determine the scope of section 2680(h)'s intentional-tort exception using the "traditional and commonly understood definition of the tort." *Jimenez-Nieves v. United States*, 682 F.2d 1, 3-4 (1st Cir. 1982) (Breyer, J.) (quoting *United States v. Neustadt*, 366

U.S. 696, 706 (1961)). One "essential element" of common-law misrepresentation is "reliance by the plaintiff *himself* upon the false information that has been provided." *Id.* at 4 (emphasis added) (citing Restatement (Second) of Torts §§ 525, 537, 552, 552C (Am. L. Inst. 1977)). Thus, the First Circuit holds, "[e]ven when the representation is made to a third party, the plaintiff must have suffered damages because he *himself* acts in 'justifiable reliance upon … the misrepresentation.'" *Id.* (alteration in original) (emphasis added) (citation omitted).

Applying that rule in *Jimenez-Nieves*, the First Circuit, in an opinion by then-Judge Breyer, sustained the plaintiff's claims against the Social Security Administration for damages suffered when the agency stopped payment on benefit checks for the plaintiff's mother due to a typographical error in its paperwork. *Id.* at 5. The First Circuit held that because the misleading statement (a notation about plaintiff's mother's date of death) was not made to the plaintiff, and the plaintiff had not relied on it, the plaintiff's claims did not encompass the "core," "traditional" view of misrepresentation as a separate tort. *Id.*

In the decades since *Jimenez-Nieves*, the First Circuit has continued to adhere to the rule that "when an element of an excepted tort is missing from the factual scenario, the claim is not pretermitted" by the FTCA. *Limone v. United States*, 579 F.3d 79, 92-93 (1st Cir. 2009) (citing *Jimenez-Nieves*, 682 F.2d at 4-5); *see also Muniz-Rivera v. United States*, 326 F.3d 8, 13 (1st Cir. 2003) (citing *Jimenez-Nieves* for proposition that "misrepresentation, as an independent tort, is comprised of the dissemination of false information and the reliance by the plaintiff upon that information"). And district courts in the First Circuit continue to require the government to show reliance by

plaintiffs in order for the FTCA's misrepresentation exception to be applicable. *See Muniz-Rivera v. United States*, 204 F. Supp. 2d 305, 310 (D.P.R. 2002) (government is not liable for a "decision made by plaintiff in reliance on a misrepresentation by a government agent"), *aff'd*, 326 F.3d 8 (1st Cir. 2003); *Mullens v. United States*, 785 F. Supp. 216, 219 (D. Me. 1992) ("Whether the misrepresentation exception applies … depends on whether the [plaintiff's] claims for negligence and negligent misrepresentation involve *reliance by the* [*plaintiff*]" (emphasis added)), *aff'd per curiam*, 976 F.2d 724 (1st Cir. 1992).

The Tenth Circuit follows the same rule: "[R]eliance by the plaintiff … upon the false information that has been provided" is one of the "essential elements of misrepresentation" required to qualify for the exception. *Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 854 (10th Cir. 2005) (citing *Jimenez-Nieves*, 682 F.2d at 4-5). Again, this is because "[t]he misrepresentation exception applies only when the action itself falls within the commonly understood definition of a misrepresentation claim." *Trentadue*, 397 F.3d at 854 (quoting *Block v. Neal*, 460 U.S. 289, 296 n.5 (1983) (internal quotation marks omitted)).[3] In the Tenth Circuit therefore, the intentional-tort bar applies only where the claim "contain[s] the essential elements of [the] excepted tort." *Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1198 (10th Cir. 2013); *DeRito v. United States*, 851 F. App'x 860, 863 (10th Cir. 2021) (claim must "satisfy the elements for" excepted tort).

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[3] *Trentadue* ultimately concluded that the plaintiff's emotional distress claim did not arise from the government's misrepresentation even apart from the lack of reliance. 397 F.3d at 855.

District courts within the Tenth Circuit thus recognize that "[t]o fall within the misrepresentation exception, the claim must include the elements of reliance by the plaintiff upon false information that resulted in pecuniary loss." *United States v. 1997 Int'l 9000 Semi Truck*, 2009 WL 10675647, at *8 (D.N.M. Sept. 23, 2009), *aff'd*, 412 F. App'x 118 (10th Cir. 2011); *see also Rapid Enters., LLC v. U.S. Postal Serv.*, 2023 WL 5979999, at *8 (D. Utah Sept. 14, 2023); *Reality Tech., Inc. v. United States*, 2015 WL 4594145, at *6 (D. Colo. May 29, 2015); *Luther v. United States*, 2014 WL 1255292, at *7 (D. Utah Mar. 26, 2014); *Andrews v. United States*, 2009 WL 5210129, at *5 (D. Colo. Dec. 23, 2009).

2. In direct conflict, the Seventh, Ninth, and Eleventh Circuits dispense with the traditional elements of the misrepresentation tort and apply the misrepresentation exception regardless of whether the plaintiff relies on the government communication. Those circuits accordingly dismiss FTCA cases (including negligence claims) involving a misrepresentation in the fact pattern even if the plaintiff did not receive or rely on the government's false statements.

The Ninth Circuit adopted that more expansive and untethered rule in the decision below. In the Ninth Circuit's view, a claim is barred as "arising out of" misrepresentation if its "gravamen" or "essence" is the government's communication of false information, regardless of whether the plaintiff himself received or relied on the communication. Pet.App.10a-12a. The Ninth Circuit explicitly held that Petitioners' claims "'arise' out of the Navy's alleged misrepresentations, even if the Navy did not directly make them to the plaintiffs." Pet.App.4a.

The Eleventh Circuit takes the same position: "[I]t does not matter for purposes of the misrepresentation exception whether the misrepresentations causing [the plaintiff's] claims were made directly to [him] or to some third party." *JBP Acquisitions, LP v. United States ex rel. FDIC*, 224 F.3d 1260, 1266 (11th Cir. 2000). Thus, the Eleventh Circuit has held that even where a plaintiff "does not allege that the Government directly misrepresented any facts" to it, the lack of reliance is "legally irrelevant to the determination of whether [the plaintiff's] claims against the Government are barred by the FTCA." *Id.*; *see also LabMD, Inc. v. United States*, 2023 WL 2336892, at *9 n.5 (N.D. Ga. Mar. 2, 2023) ("The fact that the FTC made the allegedly false representations to third parties, rather than Plaintiff, is immaterial for purposes of the misrepresentation exception."), *aff'd per curiam sub nom. Daugherty v. Fed. Trade Comm'n*, 2023 WL 6389821 (11th Cir. Sept. 29, 2023); *Castelluccio v. United States*, 2014 WL 12621566, at *9 (M.D. Fla. Mar. 19, 2014).

Similarly, the Seventh Circuit asks whether a plaintiff "would not have been injured" but for a third-party's reliance on the misrepresentation. *Schneider v. United States*, 936 F.2d 956, 961-62 (7th Cir. 1991). Applying that test, the Seventh Circuit has concluded that a third-party's reliance on the government's communication of inaccurate information to a homebuilder should be attributed to the plaintiffs, even though the plaintiffs themselves did not personally receive that information. *See id.* at 961 ("[H]ad Tri State not relied on HUD's misrepresentations, the plaintiffs would not have been injured by purchasing the defective homes.").

3. For its part, the Fifth Circuit has taken inconsistent positions on both sides of the question presented. In *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981)

(per curiam), the Fifth Circuit held that the misrepresentation exception barred claims where "the government communicated its miscalculation to [a third-party] developer who relied on it, and that reliance eventually caused the plaintiffs' damage." *Id.* at 289. That was true, the court held, even though "no express representation was made to plaintiffs," *id.* at 288, and the plaintiffs therefore "ha[d] not relied directly on the misrepresentation," *id.* at 289. But in *Saraw Partnership v. United States*, 67 F.3d 567, 571 (5th Cir. 1995), the Fifth Circuit concluded that the misrepresentation exception did not prevent a plaintiff from pursuing a claim where the Veterans Administration incorrectly recorded the plaintiff's loan payments. The court emphasized that the plaintiff "did not rely on the lack of communication by VA that there were problems with the loan," and explained that "[w]here there is no detrimental reliance on an alleged miscommunication, no claim for misrepresentation is made." *Id.* at 571.[4]

Unsurprisingly given this conflicting authority, district courts in the Fifth Circuit are still parsing the question presented. Some follow *Saraw* and hold the exception inapplicable when "there is no showing of reliance by the plaintiffs on any alleged misrepresentation made by the government." *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 731 (E.D. La. 2009), *aff'd sub nom. Robinson v. United States (In re Katrina Canal Breaches Litig.)*, 673 F.3d 381 (5th Cir. 2015), and *aff'd in part en banc sub nom. Robinson v. United States (In re Katrina Canal Breaches Litig.)*, 696 F.3d 436 (5th Cir.

[4] The Fifth Circuit also sustained the plaintiff's claims on the ground that the government's lack of communication was merely "collateral" to the government's negligence in performing operational tasks. 67 F.3d at 571.

2012). Others take a more nuanced view, concluding that "*some* reliance on [the] plaintiffs' part is necessary," but "sometimes this hurdle is met even where the government's communication was not represented to the plaintiff directly." *Holcombe v. United States*, 388 F. Supp. 3d 777, 793 (W.D. Tex. 2019).

4. The Ninth Circuit below deemed the contrary circuit decisions distinguishable because, in those cases, the misleading communications were either internal to the government or made directly to the plaintiffs. But those cases did not turn on the nature or category of the misrepresentation. Instead, they followed from this Court's decisions in *Neustadt* and *Block*, holding that courts must look to the "traditional and commonly understood legal definition of the tort" in question. *Neustadt*, 366 U.S. at 706. Indeed, the First and Tenth Circuit have concluded that even if a claim arguably *does* arise from a misrepresentation, the lack of reliance by the plaintiff still defeats the government's efforts to invoke the misrepresentation exception. The Tenth Circuit held in *Trentadue* that the misrepresentation exception did not apply notwithstanding government's argument that "misrepresentations at issue here are more than collaterally involved and constitute the very conduct giving rise to plaintiffs' emotional distress claim." *Trentadue*, 397 F.3d at 855. And the First Circuit likewise held the exception inapplicable despite "the fact that the harm to the plaintiff was caused by a false statement." *Jimenez-Nieves*, 682 F.2d at 4.

The court below thus relied on a distinction without a difference. In the First and Tenth Circuits, Petitioners' claims would have survived the government's jurisdictional challenge. Had Petitioners served with the Boston or Denver Police Departments under the same unfortunate circumstances, their claims would not have been

barred by the misrepresentation exception. But because Petitioners were injured and sued in the Ninth Circuit, their claims were extinguished. This Court should grant certiorari to correct this arbitrary disparity.

II. The Question Presented Is Important, Recurring, and Squarely Presented

1. Whether the misrepresentation exception bars FTCA claims when the plaintiff did not rely on any misrepresentation is a question of exceptional importance. The FTCA is a plaintiff's sole means of suing in federal court to recover "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." 28 U.S.C. § 1346(b)(1). Unsurprisingly, FTCA claims are among the most common causes of action brought against the federal government. According to the United States Attorneys' Annual Statistical Reports, plaintiffs filed over 11,800 tort cases against the United States in the past four fiscal years: 2,763 in fiscal year 2023, 2,905 in fiscal year 2022, 3,030 in fiscal year 2021, 3,108 in fiscal year 2020. *See* Offs. of the U.S. Att'y, Annual Statistical Reports, tbl.5, https://tinyurl.com/d5x2z6ay. And the government frequently invokes the misrepresentation exception as a defense to these claims. *See* Fed. Tort Claims § 16:6 (West 2024) ("The misrepresentation exception … has been the subject of numerous cases").

Consistent application of the FTCA and the misrepresentation exception is paramount to plaintiffs' abilities to recover, as well as the government's ability to preserve the precise waiver of sovereign immunity effected by the statute. Given the FTCA's reach to federal workers nationwide, it is especially important to keep liability under the FTCA clearly defined. Yet "[c]ourts have had diffi-

culty determining whether a claim is one for misrepresentation." *United States v. Fowler*, 913 F.2d 1382, 1387 (9th Cir. 1990). "The concept is slippery; any misrepresentation involves some underlying negligence and any negligence action can be characterized as one for misrepresentation." *Id.* (internal quotation marks omitted); *see also* David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 397 (2011) (noting that the FTCA's intentional-tort exceptions "often intersect, overlap, or even collide in complex ways in the context of a single case, creating mind-bending challenges for litigants and courts alike"). Only this Court's careful focus on the *elements* of common-law torts prevents the misrepresentation exception from gutting the FTCA.

By jettisoning the Court's focus on the elements of a misrepresentation claim, the Seventh, Ninth, and Eleventh Circuits' rule threatens to let the FTCA's misrepresentation exception swallow Congress' purposeful waiver of sovereign immunity. As this Court has observed, "many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word." *United States v. Neustadt*, 366 U.S. 696, 711 n.26 (1961) (citations omitted); *see also Jimenez-Nieves v. United States*, 682 F.2d 1, 4 (1st Cir. 1982) ("misrepresentation runs all through the law of torts as a method of accomplishing various types of (other) tortious conduct" (citations omitted)); Floyd D. Shimomura, *Federal Misrepresentation: Protecting the Reliance Interest*, 60 TUL. L. REV. 596, 599 n.13 (1986) ("The term 'misrepresentation' describes a general form of misconduct that can be an element in the invasion of a wide variety of interests." (citing Restatement (Second) of Torts (Am. L. Inst. 1977))).

The universe of potential misrepresentations that could bar an FTCA claim under the rule adopted below is vast. "One of the chief functions of government"—through administration and regulation of federal law and programs—"is to disseminate information." *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1553 (1992). The government inspects and regulates ubiquitous items ranging from aircraft to vaccines and food. It provides predictions and assessments of land, property, and weather for use by businesses and individuals. It employs physicians, dentists, and veterinarians within its agencies and the military. And it interacts with civilians to carry out intelligence and national security operations. Because communications by federal employees are imperative and omnipresent, questions about the scope of the misrepresentation exception routinely recur.

2. This case is the ideal vehicle for resolving the circuit split. The question presented was pressed and passed upon in the decision below, and the Ninth Circuit affirmed the dismissal of Petitioners' complaint solely on the ground that the misrepresentation exception applies even where the plaintiff did not rely on the alleged misrepresentation. This discrete legal question is outcome determinative in Petitioners' case, and it can be answered without factual baggage.

The need for an answer to the question presented is especially urgent in this case. Although some FTCA suits are run-of-the mill tort claims, others "involve grave allegations of government misfeasance." Michael D. Contino & Andreas Kuersten, Cong. Rsch. Serv., The Federal Tort Claims Act (FTCA): A Legal Overview 1-2 (2023), https://tinyurl.com/38u3hhcu (collecting cases). This is

such a litigation. Many Petitioners are facing life-threatening medical conditions such as cancer and lung disease. Whether Petitioners are able to recover for injuries sustained while serving the public should not depend on the circuit in which they were injured.

Nor is there a need for further percolation. The question presented has been thoroughly ventilated in multiple court of appeals decisions over more than 40 years, yet the circuits remain divided. And because of the decision below, that division has only grown. Only this Court can break the stalemate and restore uniformity to federal law.

III. The Decision Below Is Incorrect

As this Court has recognized, the FTCA's exception for intentional torts must be interpreted by reference to the common law that defines those torts. And with respect to the traditional tort of misrepresentation, the common law requires "the communication of misinformation on which the recipient relies." *Block v. Neal*, 460 U.S. 289, 296 (1983). The Ninth Circuit failed to grapple with this essential element of the tort and misread the FTCA's text.

1. The FTCA "was designed to build upon" common-law principles and legal relationships. *Richards v. United States*, 369 U.S. 1, 7 (1962). "Uppermost in the collective mind of Congress were the ordinary common-law torts." *Dalehite v. United States*, 346 U.S. 15, 28 (1953). Consistent with this understanding, in interpreting the misrepresentation exception, this Court has focused on "the traditional legal definition" of the tort "as would have been understood by Congress when the Tort Claims Act was enacted" in 1946. *Block*, 460 U.S. at 296; *see also United States v. Neustadt*, 366 U.S. 696, 706 & n.16 (1961).

Misrepresentation claims have long required reliance. *See Van Weel v. Winston*, 115 U.S. 228, 247 (1885)

("Fraudulent representations … must have been relied on." (citation omitted)). The 1938 Restatement of Torts defined negligent misrepresentation to require *the plaintiff's* "justifiable reliance upon" the alleged misrepresentation. *Neustadt*, 366 U.S. at 708 n.16 (citation omitted). Prosser's 1941 treatise likewise included an entire section called "Reliance" in its chapter on "Misrepresentation." William L. Prosser, *Torts* § 87 (1941 ed.). Thus, in *Neustadt*, the Court noted that the plaintiff-purchaser was furnished an inaccurate inspection and appraisal, and "*in reliance thereon*, [was] induced by the seller to pay a purchase price in excess of the property's fair market value." *Neustadt*, 366 U.S. at 697-98 (emphasis added). Likewise, in *Block*, this Court held that "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation *on which the recipient relies*." *Block*, 460 U.S. at 296 (emphasis added).

That common-law reliance requirement resolves this case. The government made no representation to Petitioners about the toxic nuclear waste to which they were exposed or the safety of their worksite. Instead, any misrepresentations were made exclusively to the City of San Francisco and the SFPD. *Petitioners* therefore do not satisfy the essential element of personal reliance on the misrepresentation. It makes no sense to apply the misrepresentation exception to bar the negligence claims of plaintiffs who would not even be able to bring a traditional misrepresentation claim against the government because they did not rely on a misrepresentation.

2. The Ninth Circuit recognized that "[u]nder the traditional tort of negligent misrepresentation, detrimental reliance by a plaintiff is an 'essential element' of the claim." Pet.App.13a. But it discounted *Neustadt* and *Block*'s adherence to common law, reasoning that those

cases did not address section 2680(h)'s "arising out of" language or the question of third-party reliance presented in this case. *Id.* The Ninth Circuit's interpretation of "arising out of" is contrary to this Court's guidance that the section 2680(h) exceptions should be "narrowly construed" because "'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute' which 'waives the Government's immunity from suit in sweeping language.'" *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (citations omitted). But even if the Ninth Circuit was correct to adopt a "broad construction," of section 2680(h)'s "arising out of" language, Pet.App.9a, the decision below remains flawed because a claim cannot "aris[e] out of" a misrepresentation, under any definition of "arising out of," *if there was no misrepresentation to begin with*. Put differently, the critical question is not whether Petitioners' claims "aris[e] out of" a misrepresentation in the colloquial sense; rather, as *Block* and *Neustadt* instruct, the Ninth Circuit should have asked whether there was a misrepresentation claim under the "traditional and commonly understood legal definition of the tort." *Neustadt*, 366 U.S. at 706. And as explained above, the answer to that question, as dictated by this Court's precedents, is a clear "No."

The Ninth Circuit's position is also inconsistent with the FTCA's aims. As then-Judge Breyer explained, applying the broader understanding of "arising out of" adopted by the Ninth Circuit leads to "bizarre" results and incentives. *Jimenez-Nieves v. United States*, 682 F.2d 1, 4 (1st Cir. 1982). "An injured pedestrian could not recover if, for example, the government truck driver ran over him because his co-worker falsely told him that the light was green. Nor could a homeowner recover should a government demolition crew wreck his house after being sent to

the wrong address." *Id.* Worse, the Ninth Circuit's position creates an incentive for the government to make misrepresentations. "[N]egligent parties could become insulated from liability from their wrongdoing if only they commit the additional wrong of misrepresentation. That could hardly be the intent of Congress or a reasonable interpretation of the law." *In re Flint Water Cases*, 627 F. Supp. 3d 734, 739 (E.D. Mich. 2022).

Grafted onto this case, the Ninth Circuit's illogical approach to the misrepresentation exception prevents police officers from obtaining any recovery for exposure to hazardous, toxic, and radioactive substances because the Navy falsely told their employer that their worksite was safe. That result cannot be reconciled with the FTCA's "broad and just purpose" to compensate victims for acts of governmental wrongdoing. *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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