No. _____

In the
Supreme Court of the United States

OBAYDUL HOQUE BHUIYAN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What *prima facie* showing is it necessary and sufficient for a plaintiff to make, in order to establish the existence of a private-party analogue supporting government liability under the Federal Tort Claims Act?

LIST OF DIRECTLY RELATED PROCEEDINGS

Bhuiyan v. United States, D.N.M.I. Docket No. 1:14-cv-00013
Judgment entered June 30, 2017.

Bhuiyan v. United States, Ninth Circuit Docket No. 17-16714
Judgment entered June 26, 2019.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Obaydul Bhuiyan respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is published at 772 Fed. App. 564, and is available on Westlaw at 2019 WL 2613320. It appears as Appendix A to this Petition. The decision of the District Court for the Northern Mariana Islands is unpublished. It is available at 2017 WL 2837023, and appears as Appendix B to this Petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit decided this case on June 26, 2019. A timely petition by Bhuiyan for rehearing en banc was denied by the Court of Appeals on September 5, 2019. The order denying Bhuiyan's petition appears at Appendix C to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674.

> [T]he 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. § 1346(b)(1).

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.

7 CMC § 3401 (CNMI statute).

Also involved is 8 U.S.C. § 1151(b) and U.S. Pub. L. 111-83 § 568(c), which, being lengthy, are set out in Appendix D to this Petition.

STATEMENT OF THE CASE

Statement of Material Facts

Obaydul Bhuiyan is a citizen of Bangladesh who, in 2008, had been living and working lawfully for many years in the Commonwealth of the Northern Mariana Islands (CNMI), pursuant to the local CNMI immigration laws then in force there. In 2008, however, Congress enacted legislation federalizing immigration into the CNMI, and requiring an alien to have, as of November 28, 2011, some federally conferred immigration status in order to live or work in the CNMI lawfully.[1]

Bhuyian, while investigating whether any such federal status was available to him, encountered publications of the United States Citizenship and Immigration Services (USCIS) advising that, under a special limited-time program, an alien in his particular

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[1] *See* U.S. Pub. L. 110-229, Consolidated Natural Resources Act of 2008, Title VII, Subtitle A (§§ 701-705). *See generally* Torres v. Barr, 925 F.3d 1360, 1361 (9th Cir. 2019).

situation (the widower of a US citizen, but without a green card or a pending petition for one) was eligible for permanent residency, enabling him to live and work indefinitely in the CNMI (or indeed anywhere in the US), if he filed his petition by October 28, 2011. What the publications did not say, however, was that this program was available only to an alien who had been married for *less than two years* at the time of the death of his citizen spouse.[2] Bhuiyan had been married for slightly *longer* than two years at the time of his wife's death, and he was therefore categorically ineligible.

Not knowing of this two-year limit, however, and having no reason to know of it, Bhuiyan filed his petition. The facts rendering him ineligible – the date of his marriage and the date of his wife's death more than two years later – were clearly stated on the face of Bhuiyan's petition, but USCIS nevertheless approved the petition on September 27, 2011. In reliance on this approval, Bhuiyan reasonably believed that his lawful status in the CNMI was secure. He sought no other federal status prior to the expiration of the time for doing so on November 28, 2011, although he had employment at the time, and would have been eligible for a work visa had he applied for one.

Eventually, on August 17, 2012, USCIS woke up to the requirements of the law, and revoked its prior approval of Bhuiyan's petition as "inadvertent." As a result, Bhuiyan lost not only his then-current employment but also the lawful status he needed to seek any other kind of lawful employment, losing wages during the time he was unable to work – eventually more than two years. He sued for damages under the Federal Tort Claims Act (FTCA), which provides that the United States can be held liable in tort "in

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[2] *See* U.S. Pub. L. 111-83 § 568(c)(2)(B)(ii)(II) (program applies if, *inter alia*, "the alien and the citizen spouse were married for less than 2 years at the time of the citizen spouse's death."). *See* Appendix D.

the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. § 2674. However, Bhuiyan's claim was dismissed, and the dismissal affirmed by the Court of Appeals, on the ground that he failed to demonstrate that the law would "hold a private actor liable in any similar situation." *See* Appendix A at 2-3.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court for the Northern Mariana Islands had jurisdiction pursuant to 28 U.S.C. § 1331 (granting district court jurisdiction over "civil actions arising under the . . . laws . . . of the United States") and 28 U.S.C. § 1346(b)(1) (granting district court jurisdiction over available tort claims against the United States), by way of 48 U.S.C. §§ 1821-22 (establishing the District Court for the Northern Mariana Islands, and providing that it "shall have the jurisdiction of a district court of the United States").

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals not only conflicts with decisions of this Court, it represents a reversion to a historic error that this Court has previously gone out of its way to correct. The Ninth Circuit has returned to its practice that preceded and necessitated this Court's decision in United States v. Olson, 546 U.S. 43 (2005) – taking an unduly narrow view of what kind of private activity can be considered "analogous" to the government activity at issue in the case, with the ultimate result that the government is able to escape liability due to the very fact that it is the government, performing "uniquely governmental functions."

This, of course, is precisely the situation that the FTCA exists to prevent. The essence of the FTCA is the limits it imposes on the government's ability to avoid liability to persons injured by its acts on grounds of sovereign immunity from suit, and this Court

has long embraced a robust and flexible construction of the FTCA that allows it to fulfill that purpose. As early as United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949), the Court noted, but rejected, attempts by the Government to apply "the doctrine that statutes waiving sovereign immunity must be strictly construed," writing instead:

> We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Construction Co.: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."

Id. at 383 (*quoting* Anderson, *supra*, 153 N.E. 28, 29 (N.Y. 1926)) (full citation omitted).

The Court put this approach to the FTCA into practice in Indian Towing Co. v. United States, 350 U.S. 61 (1955), when it addressed what it called "the still undetermined extent of the Government's liability under the Federal Tort Claims Act." *Id*. at 63. In Indian Towing, a tugboat had run aground due to the negligence of Coast Guard personnel in failing to properly maintain a lighthouse, and the boat owner had brought a claim against the United States for the resulting damage to the boat and the cargo on a barge that it was towing. The government argued that the FTCA "must be read as excluding liability in the performance of activities which private persons do not perform" – *i.e.*, that there is no government liability "for negligent performance of 'uniquely governmental functions.'" *Id*. at 64. Since private persons do not operate lighthouses, the government argued, lighthouse operation was a "uniquely governmental function," and therefore could not give rise to government liability. This Court disagreed, noting that the FTCA imposed government liability if a private person would be liable under "*like*" circumstances, not necessarily the *same* circumstances. *Id*. (*quoting* 28 U.S.C. § 2674). "[I]t is hornbook tort law," the Court wrote, "that one who

undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id*. at 64-65. The United States having undertaken to provide such a warning, it was liable, by analogy to a private person's liability under this doctrine, for injuries resulting to others if it failed to do perform its undertaking carefully. *Id*. at 69.

Indian Towing was reaffirmed in United States v. Olson, 546 U.S. 43 (2005) (hereinafter Olson II). The issue in Olson II, rather than lighthouse operation, was mine inspection. After "the negligence of federal mine inspectors helped bring about a serious accident at an Arizona mine," *id*. at 45, miners who had been injured in the accident brought suit against the United States. The Ninth Circuit, while it allowed the miners' claim to proceed for other reasons not at issue here, held that "there is no private-sector analogue for mine inspections because private parties do not wield regulatory power to conduct such unique governmental functions." Olson v. United States, 362 F.3d 1236, 1240 (9th Cir. 2004) (hereinafter Olson I) (internal punctuation and citations omitted). Olson I was one of a series of cases in which the Ninth Circuit had similarly found that other "unique governmental functions" had "no private-sector analogue."[3]

This Court held that the Ninth Circuit was failing to draw its analogies sufficiently broadly. *See* Olson II, 546 U.S. at 46 ("The Ninth Circuit's . . . premise rests upon a reading of the Act that is too narrow."). It reiterated the holding of Indian Towing – *i.e.*, that "the words 'like circumstances' do not restrict a court's inquiry to the *same*

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[3] *See, e.g.*, Hines v. United States, 60 F.3d 1442, 1448 (9th Cir. 1995) ("[P]rivate persons do not wield power to screen drivers of independent contractors who deliver bulk mail[.]"); Aguilar v. United States, 920 F.2d 1475, 1477 (9th Cir. 1990) ("[P]rivate individuals do not direct traffic on public highways[.]"); Doggett v. United States, 875 F.2d 684, 698 (9th Cir. 1988) (security guard at military base); Louie v. United States, 776 F.2d 819, 825 (9th Cir.1985) (military police).

circumstances, but require it to look further afield." *Id* (italics in original). It noted that analogies to mine inspection could be found with various "private persons who conduct safety inspections" in various contexts. *Id*. at 47. The point of Indian Towing, the Court noted, was that

> [p]rivate individuals, who do not operate lighthouses, nonetheless may create a relationship with third parties that is similar to the relationship between a lighthouse operator and a ship dependent on the lighthouse's beacon.

Id. "The Ninth Circuit," it therefore held, "should have looked for a similar analogy in this case." *Id.* It should, in other words, have recognized that a private person may create a relationship with third parties similar to that between a government safety inspector and the workers at the inspected site.

At first, the Ninth Circuit got the message, writing in Tekle v. United States, 511 F.3d 839 (9th Cir. 2007), that this Court in Olson II had "rejected reading the words 'like circumstances' too narrowly, by looking only at the liability of federal mine inspectors, rather than broadening the inquiry by examining the liability of private persons who conduct safety inspections." *Id*. at 851-52. It acknowledged that, under the broad and correct approach, "[e]ven if the conduct entails uniquely governmental functions, the court is to examine the liability of private persons in analogous situations." *Id*. at 852. Now, however, it has reverted to the same narrow analysis that it was the whole point of Olson II to reject. It rejected Bhuiyan's claim because, it wrote, in language that could have come from any of its pre-Olson II decisions, "there is, as a general matter, no private analogue to government withdrawal of immigration benefits." Appendix A at 3. *Cf.* Olson I, 362 F.3d at 1240 ("[T]here is no private-sector analogue for mine inspections[.]"). Not only does this subtly misstate Bhuiyan's claim – which related to

the processing of his application for immigration benefits, not their withdrawal – this is exactly the kind of reasoning that the Ninth Circuit engaged in prior to Olson II, but that this Court's decision in Olson II specifically rejected. The Ninth Circuit, in its decision in Olson I, had found that there was no private analogue, because "private parties do not . . . conduct such unique governmental functions" as mine inspections. Olson I, *supra*, 362 F.3d at 1240 (internal quotation marks omitted). This Court expressly rejected that premise, holding that it "rests upon a reading of the Act that is too narrow." Olson II, *supra*, 546 U.S. at 46. It "rejected the . . . contention that there [is] 'no liability for negligent performance of "uniquely governmental functions."' *Id*. (*quoting* Indian Towing, *supra*, 350 U.S. at 64).

After Olson II, therefore, there can be no doubt that "[t]he Ninth Circuit should have looked for a similar analogy in this case" – *i.e.*, a situation wherein a private party "may create a relationship with third parties that is similar to the relationship between a[n immigration authority] and a[n alien] dependent on [a visa]." *Cf.* Olson II, *supra*, 546 U.S. at 47.[4] Not only did the Ninth Circuit fail to look for such an analogy, however, it summarily rejected the analogies that Bhuiyan provided. He cited, for example, cases wherein private parties had been held liable for negligence in the processing of an

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[4] Bhuiyan stated the issue in these terms in his Complaint:

> Persons who process and determine applications for benefits, whether of a public or private character, on the grant or denial of which applicants will foreseeably base major and potentially life-altering decisions, owe a duty to such applicants to exercise reasonable care to process and determine such applications based on the correct eligibility criteria.

First Amended Complaint, ECF No. 16 in D.N.M.I. Docket No. 1:14-cv-00013, at ¶ 31.

application for a bank loan[5] and for a vehicle title certificate.[6] He cited a case finding this duty an appropriate private analogue for an FTCA claim based on the negligent processing of a firearms import license application.[7] He cited a CNMI case upholding a foreign worker's claim against a private employer for negligence in the processing of the worker's labor permit application.[8] He cited the generally applicable common-law rule for such situations, and established that the rule was observed in every jurisdiction that could possibly be considered "the place where the act or omission occurred."[9]

The Ninth Circuit rejected all these analogies. It did not address the common-law rule at all, except to refer to it dismissively as "general negligence principles." Appendix A at 3. As for the cases, it wrote that "reliance on out-of-jurisdiction cases does not suffice, per the plain language of the statute," *id*., apparently referring to the FTCA requirement that 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). The in-

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5 *See* Jacques v. First Nat'l Bank of Maryland, 515 A.2d 756, 762 (Md. 1986) ("[I]mplicit in the undertaking of the Bank to process the loan application is the agreement to do so with reasonable care.").

6 *See* Union Bank of Tucson, Arizona v. Griffin, 771 P.2d 219, 222 (Okla. 1989) ("The law imposes upon a person engaged in the prosecution of any work an obligation to use ordinary care to perform it in such a manner as not to endanger the property of others.").

7 *See* Appleton v. United States, 69 F.Supp.2d 83, 95 (D.D.C. 1999) ("ATF's voluntarily undertaking to review [firearms] import applications brought with it a duty to conduct that process competently.").

8 *See* Rokibul v. Philpan Int'l Corp., N.M.I. Super Ct. Civ. No. 07-0175, Order Granting Plaintiff's Motion for Summary Judgment (August 11, 2009), Dkt. No. 46-2 in 9th Cir. App. No. 17-16714.

9 *See* RESTATEMENT (SECOND) OF TORTS § 323 (Negligent Performance of Undertaking to Render Services); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM, TD No 2, § 6 (Negligent Performance of Services).

jurisdiction CNMI case cited by Bhuiyan (Rokibul) was simply called, without explanation, not "sufficiently analogous." *Id.*[10]

These reasons for rejecting Bhuiyan's claim appear absurd on their face. The "general negligence principles" that Bhuiyan cited set out the same "hornbook" duty of care in the carrying out of one's "undertakings" that this Court held sufficient to support FTCA liability in Indian Towing. Besides, what else would a state court apply to a negligence claim against a private party besides "general negligence principles"? Similarly, the application of the "law of the place" cannot logically preclude reliance on "out-of-jurisdiction cases," since a state court deciding a common-law claim will commonly refer to cases from other states in reaching its decision, employing the same process of analogy that a federal court is supposed to apply in deciding an FTCA claim. That is especially true in the CNMI, which, by its own choice-of-law statute, expressly relies on the Restatements and on the common law "as generally understood and applied in the United States." *See* 7 CMC § 3401.[11] In light of this statutory mandate, one cannot follow the law of the CNMI *without* consulting out-of-jurisdiction cases. As for the in-jurisdiction Rokibul case, which the Ninth Circuit found was not "sufficiently analogous," the context of the negligence was the same as it was here – *i.e.*, the

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[10] Bhuiyan has also cited cases from Vermont, due to the government's contention, as yet unresolved by any court, that Vermont, not the CNMI, was "the place where the act or omission occurred." The Ninth Circuit rejected these cases for the same unexplained reason that it rejected Rokibul – that they were not "sufficiently analogous." Appendix A at 3.

[11] "In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary[.]"

processing of an application, by an alien worker, for the papers that would allow him to remain and work lawfully in the CNMI. The injury to the worker was also the same – *i.e.*, a prolonged period of unemployment and consequent loss of income. The only difference is the fact that the negligent actor in Rokibul was a private individual rather than the government. It is difficult to imagine anything more analogous, or most suited to the kind of analogical FTCA analysis that this Court has repeatedly endorsed. Finally, as noted above, the Ninth Circuit's third stated reason for rejection of Bhuiyan's FTCA claim – that "there is, as a general matter, no private analogue to government withdrawal of immigration benefits" – represents the kind of narrow understanding of "analogue" that typified the Ninth Circuit's now-discredited pre-Olson II approach to FTCA claims.

In any event, none of these reasons are given any kind of explanation or analysis. The Ninth Circuit does not explain why cases arising in other jurisdictions, or even cases arising on similar facts in the same jurisdiction, are not sufficient to create a private-party analogue for a government duty to exercise due care in the processing of a visa application. Evidently, however, it regards each of these reasons as sufficient to create an exception to the broad reading that this Court has given to the FTCA in Aetna, in Indian Towing, and again, most recently, in Olson. Nothing on the face of those cases appears to justify such exceptions. Certainly, Olson's instruction to courts to "look further afield" for analogies does not suggest any necessity of stopping at the state line, or of drawing fine distinctions within it. Indeed, such "refinement of construction" is precisely what Aetna has long cautioned courts to avoid. Petitioner therefore calls upon the Court to clarify whether such exceptions exist, and if so, what their limits are, and whether this case falls within them. To leave the question open is to leave the government itself

unsure of its duty of care, and those injured by its acts and omissions, in a state of confusion as to the possibility of redress.

CONCLUSION

For the foregoing reasons, Petitioner submits that the writ of certiorari should be granted.

Respectfully submitted.

/s/ Joseph E. Horey

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