No. 24-510

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

REPLY BRIEF OF PETITIONER

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Petitioners are active and former San Francisco police officers and their surviving family members who brought negligence and other claims under the Federal Tort Claims Act. They are trying to recover for radioactive-waste poisoning caused by the Navy's failure to supervise cleanup activities at the contaminated Hunters Point Naval Shipyard where the officers served. They allege that the Navy lied to the City of San Francisco—but *not* to petitioners—about the safety of Hunters Point. The lower courts barred all their claims on one ground: the misrepresentation exception to the FTCA.

Whether the FTCA's misrepresentation exception applies in this case even though petitioners never received or relied on any misrepresentation is a paradigmatic issue for this Court's review, and one that has divided the circuits. The First and Tenth Circuits apply a common-

sense rule rooted in the common-law definition of misrepresentation: the misrepresentation exception only applies if the plaintiff relied on a government misrepresentation. The Seventh, Ninth, and Eleventh Circuits disagree, forbidding FTCA claims regardless of the plaintiff's reliance so long as the court finds some government misrepresentation to *someone* is essential to the plaintiff's claims.

The government attempts to reconcile the fractious lower court opinions. But petitioners are not alone in recognizing the lower courts' "discordant answers" to the question presented. *Carter v. United States*, 725 F. Supp. 2d 346, 357-58 (E.D.N.Y. 2010), *aff'd in part, rev'd in part on other grounds*, 494 F. App'x 148 (2d Cir. 2012). Worse still, both sides of the split claim to be supported by this Court's opinions on the misrepresentation exception. Only this Court can set the record straight and restore uniformity on this important question of federal law.

Review is especially warranted here because of the enormous implications of the circuits' warring approaches to the misrepresentation exception. The FTCA is one of few meaningful avenues available to recover for the government's wrongdoing. But citizens in some parts of the country are blocked from relief—even in cases of grievous negligence like this one—while similarly-situated citizens elsewhere can freely bring suit.

The government does not dispute that the question presented is important, recurring, and squarely presented. And the government raises no vehicle problems with this case because there are none. The government focuses primarily on attempting to defend the decision below. But the government's overbroad reading of the misrepresentation exception cannot be squared with the undisputed (and indisputable) common-law definition of "misrepresentation." The government's reading also defies the FTCA's text, history, and purpose, public policy,

and the directives of this Court's precedents. In any event, the government's merits arguments are just that: arguments best addressed at the merits stage. They are no reason to deny review of this important and cleanly-presented question, which has long caused discord and confusion in the lower courts.

I. The Decision Below Deepened a Clear Circuit Split

The courts of appeals are intractably divided over whether the FTCA's misrepresentation exception can extinguish claims even if the plaintiff did not personally rely on the government's misrepresentation. The First and Tenth Circuits say no because the common law tort of misrepresentation—the tort to which this Court instructed lower courts to look in interpreting the misrepresentation exception—requires reliance. The Seventh, Ninth, and Eleventh Circuits say yes, giving the misrepresentation exception much broader reach. Pet. 12-19. That longstanding circuit split calls out for the Court's attention.

The Common-Law Approach. In the First Circuit, the misrepresentation exception does not bar FTCA claims unless the claims track all the "essential element[s]" of the common-law tort, including "reliance by the plaintiff *himself* upon the false information that has been provided." *Jimenez-Nieves v. United States*, 682 F.2d 1, 4-5 (1st Cir. 1982) (Breyer, J.) (emphasis added). For the misrepresentation exception to apply, "the plaintiff *must* have suffered damages because he himself acts in 'justifiable reliance upon … the misrepresentation.'" *Id.* at 4 (emphasis added) (citation omitted).

The government (at 15) dismisses that clear holding as dicta. The government is incorrect. In *Jimenez-Nieves*, the personal reliance requirement was essential

to the case's disposition. 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. 682 F.2d at 4-5. Then-Judge Breyer's *Jimenez-Nieves* opinion included multiple paragraphs explaining why the personal reliance requirement "makes sense." *Id.*

The government's efforts to characterize *Jimenez-Nieves*' extended discussion of reliance as dicta are especially surprising given that the United States itself previously recognized that *Jimenez-Nieves* "*held* that the misrepresentation exception did not apply to the plaintiff's claims because the false statement at issue had not been 'made to the plaintiff and he did not rely upon it.'" U.S. Br., *Carter v. United States*, 2011 WL 2678187, at *43 (2d Cir. July 1, 2011) (emphasis added) (quoting *Jimenez-Nieves*, 682 F.2d at 5).

Subsequent decisions have reiterated *Jimenez-Nieves*' central holding, affirming that "when an element of an excepted tort is missing from the factual scenario"—as reliance is missing from the claims here—"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* Pet. 13-14 (citing cases).

The Tenth Circuit's adoption of a categorical rule requiring reliance is equally clear and follows from that court's recognition that reliance by the plaintiff is an "essential component[]" of misrepresentation. *Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 854-55 (10th Cir. 2005) (citation omitted). The government (at 15-16) notes that the claims in *Trentadue* failed for additional reasons. *Accord* Pet. 14 n.3. But later cases

have reinforced *Trentadue*'s baseline legal rule, repeatedly emphasizing that a claim must "contain the essential elements of [the] excepted tort" for the misrepresentation exception to apply. *Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1197-98 (10th Cir. 2013); *see 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 DeRito v. United States*, 851 F. App'x 860, 863 (10th Cir. 2021) (the claim must "satisfy the elements for" excepted tort). The government, unsurprisingly, identifies no First or Tenth Circuit decision applying the FTCA's misrepresentation exception where the plaintiff did not personally rely on the alleged misrepresentation.

The Broad Approach. In direct conflict with the First and Tenth Circuits, 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 personally relied on the government communication. Pet. 15-17. In those circuits, "it 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); *see Schneider v. United States*, 936 F.2d 956, 961-62 (7th Cir. 1991); Pet.App.10a-12a.[1]

[1] The government (at 12 & n.*) lumps the Fifth Circuit in with the Seventh, Ninth, and Eleventh Circuits as following the broad, no-reliance approach. As explained in the petition, Pet. 16-18, the Fifth Circuit itself, and district courts within the Fifth Circuit, have in fact taken both sides on the question presented. Although such intra-circuit conflict may not by itself be a reason for this Court to grant certiorari, the Fifth Circuit's persistent confusion on the question presented highlights the need for this Court to resolve the *inter*-circuit conflict that does exist outside the Fifth Circuit.

The government (at 11) insists that courts of appeals "consistently" apply the misrepresentation exception when the misrepresentation itself "is essential to a plaintiff's claim." But the government's examples are all from the circuits on the "no reliance needed" side of the split. All the government's argument shows is that some courts have "consistently" applied an approach that is diametrically opposed to the rule adopted by the First and Tenth Circuits. That is the definition of a circuit split.

That circuit split was plainly outcome determinative here. In the First or Tenth Circuits, petitioners' case would be on its way to discovery because those courts would find the misrepresentation exception inapplicable where petitioners did not personally rely on the government's misrepresentations. But because petitioners had the misfortune to be injured in the Ninth Circuit, their negligence claims were foreclosed by the government's decision to lie to *other people*.

Only this Court can resolve that irreconcilable conflict and restore uniformity to this important area of law. Indeed, circuits on both sides of the split cite this Court's decisions in support of their preferred rules. For example, the First Circuit cites *United States v. Neustadt*, 366 U.S. 696 (1961), for the proposition that "'misrepresentation' for Tort Claims Act purposes … involve[s]—at a minimum—the core element of reliance by the plaintiff himself upon false information." *Jimenez-Nieves*, 682 F.2d at 4. By contrast, the Ninth Circuit below accused petitioners (and by extension the First Circuit) of taking *Neustadt* "out-of-context," Pet.App.12a (cleaned up), and instead concluded that under *Block v. Neal*, 460 U.S. 289 (1983), claims are barred whenever a misrepresentation is "'essential' to the plaintiffs' negligence claims." Pet.App.23a. The government (at 10) admits that neither *Neustadt* nor *Block* answered the question of no-plaintiff-

reliance raised here. Until this Court explains what it meant, identically-situated plaintiffs will be subject to different legal regimes in different parts of the country.

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

The government does not dispute that the question presented is important and recurring. That some circuits have "applied the misrepresentation exception in similar circumstances for decades," Opp. 17, is no reason to ignore this increasingly fractious legal question. Furthermore, the government ignores the real-world consequences of the split: would-be plaintiffs in the Seventh, Ninth, Eleventh (and potentially the Fifth) Circuits are currently blocked from suing the government for any claims involving a misrepresentation even if the plaintiffs did not personally rely on the misrepresentation.

The question is also cleanly presented. The government (at 17) briefly argues that other exceptions to the FTCA might bar petitioners' claims. But as the government acknowledges, the district court (and thus the court of appeals) "had no occasion to consider application of those provisions." Opp. 17. The only reason petitioners' claims failed below is because the lower courts concluded that the misrepresentation exception barred them, notwithstanding the lack of any misrepresentation to the petitioners. The government's additional arguments have no bearing on the Court's determination of whether to grant this petition or the merits of the question presented.

III. The Decision Below Is Incorrect

The common law torts were "[u]ppermost in the collective mind of Congress" when Congress was designing the FTCA. *Dalehite v. United States*, 346 U.S. 15, 28 (1953). The government (at 10) admits that this Court's prior decisions in *Neustadt* and *Block* "emphasized the

traditional tort of misrepresentation in interpreting the FTCA's misrepresentation exception." And the government never disagrees that the traditional and commonly understood definition of misrepresentation requires reliance *by the plaintiff*. *See* Pet. 22-23. The misrepresentation exception, therefore, cannot apply where there was no misrepresentation to the plaintiffs—let alone reliance by the plaintiffs.

The government's various counterarguments rehash the Ninth Circuit's flawed reasoning.

The government (at 6-8) argues that the Navy's alleged misrepresentations *to the City of San Francisco* are "essential" to Petitioners' claims, and therefore their claims must "arise out of" a misrepresentation for purposes of the FTCA. In fact, the claims the government highlights from petitioners' second amended complaint show that the opposite is true: petitioners allege that they were harmed by the government's negligence and negligent supervision, not reliance on a direct misrepresentation by the government. Courts have recognized that similar claims are not barred by the FTCA. *See, e.g.*, *In re Flint Water Cases*, 482 F. Supp. 3d 601, 639 (E.D. Mich. 2020) ("EPA's misstatements to Flint citizens are not essential to Plaintiffs' claims, which are about negligence.").[2]

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[2] The government's assertion (at 11) that petitioners "failed to preserve" any argument that they brought claims other than misrepresentation is wrong and a red herring. After the district court held that the misrepresentation exception warranted dismissal of all of petitioners' claims, including their claims for negligence, public nuisance, intentional and negligent infliction of emotional distress, loss of consortium, and wrongful death, Pet.App.39a-40a, petitioners argued in the court of appeals that their "claims all fall within the FTCA's waiver of sovereign immunity," Appellant Br., *Abbey v.*

Even if the Navy's false statements to the City were "essential" to petitioners' claims, *Neustadt* and *Block* would not compel application of the misrepresentation exception in this case. *Block* held that "where the misrepresentations alleged are '*not* essential' to an otherwise actionable claim, the exception will *not* bar that claim." *In re Flint Water Cases*, 482 F. Supp. 3d at 639 (quoting *Block*, 460 U.S. at 296-98) (emphases added). The inverse is not necessarily true. This Court has not yet directly addressed whether the misrepresentation exception can apply when the core element of plaintiff-reliance is absent.

The government (at 8-10) argues that Congress' use of the phrase "arising out of … misrepresentation" renders the misrepresentation exception broad enough to extinguish claims brought by individuals who never relied on a government misrepresentation. The question presented turns on the meaning of "misrepresentation," not "arising out of." *See* Pet. 24. And neither of the government's cited cases interpreted the "arising" language to broaden the definition of the underlying tort.

In *United States v. Shearer*, 473 U.S. 52 (1985), a serviceman's mother sued the Army claiming its negligence caused her son's death when he was murdered by another serviceman. This Court held that section 2680(h)'s exception for claims "arising out of assault [or] battery" barred the mother's suit because the suit "stem[med] from a battery committed by a Government employee." *Id.* at 54-55. But *Shearer* did not interpret section 2680(h)'s "arising

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United States, No. 23-15170 (9th Cir. Aug. 28, 2023), ECF No. 19, at 4. Therefore, petitioners have preserved the argument that the misrepresentation exception does not bar all of their claims. In any event, there can be no waiver of the *fact* that petitioners brought these other claims.

out of" language to expand the common-law definition of battery. Nor did it conclude that Congress' use of "arising out of" excused government negligence generally. To the contrary, the Court emphasized that its decision was "not inconsistent with the line of cases holding that the Government may be held liable for negligently failing to prevent the intentional torts of a non-employee under its supervision." *Id.* at 56. Petitioners here similarly seek to hold the government liable for, among other things, the Navy's negligent supervision of Tetra Tech, Inc., and the resulting harm to petitioners.[3]

Kosak v. United States, 465 U.S. 848 (1984), is even further afield. That case concerned the FTCA exception for claims "arising in respect of … the detention of any goods, merchandise, or other property by any officer of customs." 28 U.S.C. § 2680(c). The Court concluded that the exception bars claims when "property is damaged through the tortious conduct of customs officials" as well as claims stemming from the detention itself. *Kosak*, 465 U.S. at 862. *Kosak* does not suggest that the "arising" language broadens the meaning of the actions that follow in the statute; the Court was expressly "not consider[ing] the meaning of the term 'detention' as used in the statute." *Id.* at 853 n.8.

Turning from text to policy, the government (at 9-10) repeats the district court's assertion that it would not make "common sense" to immunize the government from suit by the party to which it makes a misrepresentation, but not when the government is sued by "downstream

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[3] Tetra Tech recently offered to pay the federal government over $97 million to resolve claims relating to its environmental cleanup failures at Hunters Point Naval Shipyard. *See* Notice of Settlement, No. 3:13-cv-03835 (N.D. Cal. Jan. 17, 2025), ECF No. 452; Partial Consent Decree, No. 3:13-cv-03835 (N.D. Cal. Jan. 17, 2025), ECF No. 453-1.

third parties who allege they were indirectly harmed by the alleged misrepresentation." But there are reasons Congress might have intended to immunize the government from traditional common law misrepresentation claims, but not bar various claims by third parties who were harmed by government wrongdoing involving a misrepresentation. For example, Congress might have considered that "the frequency with which the Government would be obligated to pay" claims by plaintiffs who did not directly rely on a government misrepresentation would be sufficiently low that permitting such claims would not impose any great burden. *Kosak*, 465 U.S. at 859-60.

The government also ignores the "bizarre" incentives created by its own preferred rule. *Jimenez-Nieves*, 682 F.2d at 4. Under the government's test, negligent government actors can shield themselves from liability by committing the further tort of misrepresentation. That result runs counter to this Court's warnings against an interpretation of the misrepresentation exception that "would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits." *Block*, 460 U.S. at 298.

In any event, the government's policy objections are "properly addressed to Congress, not to this Court." *Kosak*, 465 U.S. at 862. The only question before this Court is a legal one: did the Court mean what it said when it instructed lower courts to focus on "the traditional legal definition" of the tort "as would have been understood by Congress when the Tort Claims Act was enacted" in 1946? *See Block*, 460 U.S. at 296. The Court should grant certiorari, resolve that question, and ensure that a citizen's ability to recover for the government's negligence does

not turn on the happenstance of where the government's wrongdoing occurred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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